



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 8 OF 2018

(CORAM: F.M. GIKONYO J.)

REPUBLIC

-versus-

OLESHIRO OLE KEIWUA.....1ST ACCUSED

KITERENGA KEIWUA.....2ND ACCUSED

JUDGMENT

[1] The two accused persons are charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on the night of 16th May 2016 at Ewaso Nyiro area Narok South Sub County within Narok county jointly murdered Kimaru Keiwua.

[2] Both accused persons denied the charge. The matter proceeded to full trial. The Prosecution sought to prove its case through a combination of direct evidence and circumstantial evidence. It called seven (7) witnesses while the defence called only the accused persons.

Prosecution Case

[3] **PW1- David Wuantai Keiwua.** and **PW4- Kipamba Ole Keiwua.** They both stated that they received phone calls from one Memusi Ole Keiwua on 17th May 2016. Memusi informed them that Kimaru was dead. The body was found lying at the boundary of the shamba between the deceased's shamba and Memusi's. The body was some distance from the deceased's home. The shamba had wheat and trails of dragging of body from house of the deceased to wheat field. The police officers then took the body to Narok district hospital. He later identified the body of the deceased after which a post mortem was done.

[4] PW1 testified that while at the scene he saw the police officer take photographs which photos he identified. There was a crowd of about fifty people. Both PW1 and PW4 identified the body during post mortem examination.

[5] On cross examination both confirmed that the deceased and 1st accused person were friends and were always in the company of each other.

[6] **PW2- Saoli Ole Keiwua.** He was the first to see the deceased person. It was around 7:30 a.m. on 17th May 2016 when he went to the shamba and he saw a shuka from a distance. He went near it. He recognized the person as Kimaru Keiwua. When he checked after approaching, he realized that he was not breathing. He went to call other people. By the time he came back with PW7- they found other villagers were already at the scene.

[7] On cross examination, PW2 stated that the accused persons were friends to the deceased and he was not aware of any differences. The court sought clarifications on how he came to know of the death of the deceased person. He stated that in maasai culture he had to go and tell other people first then find a way of informing the wife of the deceased. He also told court that when he went back at the scene he found more than twenty people already gathered at the scene.

[8] **PW3- Jane Keiwua.** she testified that on 16th may 2016 at around 8.00 p.m. She was at her homestead. The 1st accused person and the deceased entered into her house and requested for supper. Since she had not cooked any food she roasted some maize which they were carrying. She roasted one. They divided it and left. She was informed at 4 P.M. the following day that Kimaru Keiwua was found dead.

[9] On cross examination, she stated that she never saw both accused person kill the deceased. When they left her house the deceased and

the 1st accused person were happy.

[10] **PW5- Pc Henry Kiboma.** He accompanied the investigating officer to a murder scene. He took nine photographs at the scene. Photo 1 shows a general view of the house of the deceased. Photo 2 shows a closer view of a bed inside the house where the deceased was sleeping when he was murdered. The photograph shows blankets. Photo 3 shows a closer view of the 2nd accused leading police officer towards the wheat plantation. Photo 4 shows a closer view of the 2nd accused person following dragging marks ahead of the wheat plantation. Photo 5 and 6 shows a closer view of the deceased body near wheat plantation while members of the public are standing by. Photo 7 shows body of the deceased face upwards. Photo 8 shows a closer view of the police officers pointing to the marks around the neck of the deceased. Photo 9 shows a closer view of the officers preparing to remove the body from the scene. He produced the nine photos as **P Exh 2(1-9)** and the certificate and report in respect of the same as **P Exh 3**

[11] **PW5 -Mutahi Kiplangat Titus.** He was a medical Officer based at Ndanai sub county hospital as a Superintendent. He performed the post mortem and made a report on 18th May 2016. The report was signed on 19th May 2016. He indicated that the neck of the deceased had strangulation marks. He went further to state that the cause of death was cardiorespiratory arrest secondary to severe hypoxia and brainstem injury following strangulation which caused upper air way obstruction. This corroborates the testimony of other witnesses that there were strangle marks on the neck of the deceased.

[12] **PW6- Dennis Mugambi.** he was the investigating officer in this case. He testified that after interviewing the 2nd accused, the 2nd accused confessed of the murder and mentioned the 1st accused as an accomplice to the murder. He narrated to them how and where the 2nd accused and him had killed the deceased and dragged him. The 2nd accused showed them the path in the midst of wheat farm which they had dragged the deceased. At some point they came across some rope which the 2nd accused said they used to strangle the deceased. The 2nd accused then directed them to where the deceased's body was lying.

[13] He witnessed the taking of the photographs at the scene which photos were produced as **P Exh. 2 a-i.** he further stated that he saw the rope which was allegedly used. The same was also photographed but he could not see or show it in the photo. The said rope looked more of an old net which by all circumstances could not be used to strangle.

[14] The 1st accused person was arrested by the public and later re arrested by the police. The body of the deceased was taken to Narok district hospital mortuary. The accused persons were taken to the police station to record statements and later charged with murder. A piece of rope blue in colour was recovered from the scene and produced as **P Exh. 4**

[15] On reexamination, he stated that the basis for charging the accused persons jointly was that the two accused persons had an affair and that was the reason for eliminating the deceased.

[16] **PW7- Mwangi Ole Keiwua.** He testified that he went to Olabaani. He met Kimaru and Oleshiro at a village at around 4:30 P.M. on 16th May 2016 at a wedding ceremony. They were having drinks(beer) and eating. He left for another village. The following morning PW2 informed him that he had found Kimaru dead.

Submissions by the prosecution

[17] The prosecution submitted that the 2nd accused's personal knowledge of where the deceased's body was that led to discovery of material evidence by the investigation officer. The same is admissible under Section 111(1) of the Evidence Act.

[18] The prosecution submitted that the two accused persons were last persons to be seen with the deceased and all of them knew each other very well.

[19] The prosecution submitted that the accused person's acts were calculated. that they tendered evidence that the deceased was murdered and dragged to the wheat farm.

[20] The prosecution in support of their case cited the following authorities

- i. ***Republic Versus Ahmad Abolfathi Mohammed and Another (2019) eKLR***
- ii. ***Milton Kabulit and 4 Others Versus the Republic (2015) eKLR***
- iii. ***Ramanlal Tramaklal Bhatt V R [1957] EA 332***
- iv. ***Sawe V Republic [2003] KLR 364***
- v. ***Venzio Nzivo V Rep***
- vi. ***Republic V Susan Kahindi [2010] eKLR***

The Defence Case

[21] At the close of the Prosecution case, this Court ruled that the Accused persons had a case to answer and put them on their Defence.

[22] **DW1- Oleshio Ole Keiwua.** The 1st accused person herein. He testified that they were drinking with the deceased at the wedding ceremony. They went to the farm where the 1st accused was guarding zebras. They took maize from the farm. PW3 roasted one maize for them after they requested for food. They then left pw3's house and each went different ways to their homes. at around 8.00 p.m. The following day he went to the market at Olulunga. at around 10:30 a.m. two boys with a motor cycle came and questioned him about the whereabouts of Kimaru and when they parted ways, they informed him that Kimaru was found dead in a wheat plantation near his home. They went to the scene where they found many people. He was later arrested because he was the last person seen with the deceased the previous day.

[23] On cross examination, he stated that they were friends with the deceased. They were together on the night of 16th May 2016 when he roasted maize for them.

[24] **DW2- Kiterenga Keiwua.** She testified that on 16th May 2016, the deceased left home at around 9-10 A.M. He went to a marriage ceremony. He did not come for lunch. He never came in the evening. She slept with the kids, since whenever the deceased was drunk he never came home. She slept with the kids till morning. She prepared them for school. At around 8.00 a.m. on 17th may 2016 PW2 and PW4 and two other people came and told her that her husband was found dead at the end of their shamba. She was escorted to see the body. She was brought back to her house by people. She stayed there until the Police came who told her to take them to the scene the second time while taking the photographers. Together with the family members, the police started questioning her about the killers of her husband. They beat her up. The family brought her and the 1st accused person to record statements. The family told her to name the people who had killed her husband so that she can be allowed to go home and stay with her kids.

[25] On cross examination, it came out clearly that the deceased never came back home that night. She slept with her four children aged between 8 years and 2 years.

Submissions by the defence

[26] The 1st accused person submitted that the evidence adduced by the 7 prosecution witnesses failed to connect him to the murder hence he should be acquitted on a no case to answer.

[27] The 1st accused person submitted that none of the prosecution witnesses witnessed him murder the deceased.

[28] The 1st accused person submitted that PW5 never gave any explanations why post mortem was done on the same day but dated on a different day

[29] The 1st accused person submitted that PW6 failed to follow the procedure laid down on confessions which therefore cannot be a basis for charging the accused persons.

[30] The 1st accused person submitted that pw6 did not interview the children of the 2nd accused person.

[31] The 1st accused person submitted that PW6 failed to conduct DNA tests on the extracts from the murder rope to ascertain who exactly were the murderers.

[32] The 1st accused person submitted that PW6 failed to call credible witnesses and only chose to call relatives of the accused persons when it was evident that other members of the public were also at the scene.

[33] The 1st accused person in support of her case cited the following authorities

i. Republic V Alex Maina Mugo [2019] eKLR

ii. Republic V Maingi Kioko [2020] eKLR

[34] The 2nd accused person submitted that the prosecution failed to provide evidence that point to the 2nd accused person excluding all other persons.

[35] The 2nd accused person submitted that no ill motive or grudge was demonstrated by the prosecution that could have made the 2nd accused person murder the deceased.

[36] The 2nd accused person submitted that the prosecution failed to connect the 2nd accused person with the offence of murder. She prayed to be acquitted.

[37] The 2nd accused person in support of her case cited the following authorities

i. In Rex V Tubere S/O Ochien [1945] EACA 63

ii. Nzuki Vs Republic [1993] eKLR P. 171

iii. Okeno Vs Republic [1972] EA

iv. Kipkering Arap Koske & Another 16 EACA

v. Sawe Vs Republic KLR 364

ANALYSIS AND DETERMINATION

[38] The central issue for my determination in this trial is whether the two Accused Persons jointly committed the murder of the Deceased.

Elements of murder

[39] According to Section 203 of the Penal Code:

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

[40] Therefore, the prosecution must prove beyond reasonable doubt:

- i. The fact of death;
- ii. The cause of death;
- iii. That the death was caused by the unlawful act or omission of the accused; and
- iv. That there was malice aforethought; and

The fact and cause of death

[41] The fact and cause of death could be handled together for their inextricable connection.

[42] The body was identified by **David Wuantai Keiwua**. and **Kipamba Ole Keiwua** on 18/05/2016.

[43] Dr. Mutai Kiplangat Titus examined the body on 18/05/2016 and signed the filled post mortem form on 19/05/2016. He indicated that the neck of the deceased had strangulation marks. He went further to state that the cause of death was cardiorespiratory arrest secondary to severe hypoxia and brainstem injury following strangulation which caused upper air way obstruction. This corroborates the testimony of other witnesses that there were strangle marks on the neck of the deceased.

[44] The medical evidence as well as those who identified the body of the deceased proves the death of the deceased beyond reasonable doubt.

Was death due to unlawful act or omission of the accused?

[45] According to Dennis Mugambi, he interviewed DW2 who confessed to committing the murder and mentioned DW1 as her accomplice. DW2 narrated to the investigating officer how and where DW1 and DW2 had killed the deceased and dragged him to the wheat farm. He claimed that DW2 showed them the path in the midst of wheat farm which they had dragged the deceased through. Ultimately, he stated that DW2 directed them to where the deceased's body was lying. He produced Photos produced as **P Exh 2(1-9) which** show the events of the said date. The theory put forward by the prosecution was that DW2 and DW1 had an affair and hence they decided to eliminate the deceased.

[46] The investigations officer Dennis Mugambi largely based his testimony on confessions made by DW2. Confessions are only admissible if obtained lawfully and in accordance with the law.

[47] DW2 in her defence stated that she was escorted to see the body and then brought back to her house by people. She stayed there until the Police came who told her to take them to the scene of crime; this was the second time- and they were taking photographs as they went to the scene. Together with the family members, the police started questioning her about the killers of her husband. They beat her up. The family brought her and the 1st accused person to record statements. The family told her to name the people who had killed her husband so that she can be allowed to go home and stay with her kids.

[48] The defence by the 2nd accused person is against the alleged confession herein. Proper basis for the taking and recording of the confession was not laid before the court. it is safer to consider the investigations conducted as well as testimony of the witnesses; direct or circumstantial rather than rely on the confession.

[49] The evidence herein is largely circumstantial. Circumstantial evidence should point to no other inference than the guilt of the accused. The guiding principle as was formulated in Teper v. R(2) [1952] A. C. 480 by the Privy Council is that:

“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.”

[50] DW2 in her defence stated that the deceased did not come home on the fateful night. According to the IO, the 2nd accused showed them the path in the midst of wheat farm through which the deceased had been dragged to the wheat plantation. PW1 corroborated this piece of evidence. The IO further stated that the 2nd accused also directed them to where the deceased's body was lying. The 2nd accused defended herself that the police came after she had already been taken to the scene by some people and escorted back home. She took the police to the scene. But, this was the second time she was visiting the scene. This defence is an afterthought in light of the evidence by the prosecution which shows that she had special knowledge of where the body of the deceased was. The photographs produced also support the evidence by the IO and connect the 2nd accused with the death of the deceased.

[51] Of the 1st accused person, evidence shows that he was the last person to be seen with the deceased at the wedding. See the testimony of **PW3- Jane Keiwua**. She testified that on 16th May 2016 at around 8.00 p.m. She was at her homestead. The 1st accused person and the deceased entered into her house and requested for supper. Since she had not cooked any food she roasted some maize which they were carrying. She roasted one. They divided it and left. The 1st accused person confirmed this testimony except he stated that after they left her home, he parted ways with the deceased each going separate ways. PW3 was then informed at 4 P.M. the following day that Kimaru Keiwua was found dead.

[52] Further, PW7 stated that he saw the 1st accused having beer with the deceased at a wedding ceremony he had also attended. The 1st accused also confirmed that he was with the deceased at that ceremony and were having beer together.

[53] The 1st accused was the last person seen with the deceased, and in light of the investigations by PW6, and testimonies of PW3 and PW7, the 1st accused is connected to the death of the deceased. I find on the basis of circumstantial evidence an inescapable inference arising therefrom points to the guilt of the 1st accused.

[54] **Section 20 of the Penal Code** – Principal Offenders states: -

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

Of malice aforethought

[55] Section 206 of the Penal Code, provides circumstances in which malice aforethought is established, when there is evidence of;

i. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;

ii. Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not;

iii. Intent to commit a felony; or

iv. Intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

[56] Arising out of the circumstantial evidence is that the deceased died of strangulation. Such act is intended to produce death or grievous harm. The evidence shows common intention by the two accused to murder the deceased. The circumstantial evidence connected each of the accused to the death of the deceased as principal offenders.

[57] Both are convicted for murder of Kimaru Keiwua on the night of 16th May 2016 at Ewaso Nyiro area Narok South Sub County within Narok county, contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

[58] The 1st accused shall be taken into custody. Appeal 14 days.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29TH DAY OF NOVEMBER, .2021

F. GIKONYO M.

JUDGE

In the presence of:-

1. Both accused persons
2. Yenko advocate for the 2nd accused
3. Yenko advocate holding brief for Nyaribo fo 1st accused
4. M/S Torosi for DPP
5. Kasaso C/A