



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL (MURDER) CASE NO.66 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

MAINGI KIOKO.....ACCUSED

JUDGEMENT

1. The accused, **Maingi Kioko** was charged with two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars being that the accused on 25th October, 2014 at Misakwani sub-location, Mumbuni Location in Machakos District within Machakos County murdered **WKM** and **PWM**.

2. The prosecution evidence was thus; that **GMM (PW1)** prepared her younger children, **WKM** and **PWM** for tuition on 25th October, 2014 at around 7.00 am and she left for town. Her elder daughter **BM (PW2)** was left home with the children. When PW1 returned home at around 7.00 pm she did not find the two younger children (deceased). Upon inquiry, PW2 informed her that the deceased had gone missing since 1.00 pm. She together with her husband and neighbour lodged a search for the deceased. The accused who is her brother-in-law was questioned as to why he was asleep while everyone was involved in the search and he responded that the deceased were old enough and would be back home when they were ready. The search did not yield anything and the issue was reported to the police. PW1 stated that she suspected that the accused had a hand in the matter for the reason that he had earlier on threatened to rape PW2. She called PW2 and instructed her to search the accused's house. By this time, the accused had joined the search team. PW2 searched the accused's house and found the clothes that had been worn by the deceased on the material day being; W's pink T-Shirt and grey trouser and Peter's black trouser, light green T-Shirt and a flowered sweater. The accused overheard that the clothes had been found at his house and tried to flee but was held and interrogated by the police. The accused was said to have explained that he saw the children collecting firewood but that he did not inform PW1 because they were not in talking terms. On 26th October, 2014, B raised alarm that the deceased's bodies had been found about 10 meters from the accused's house. The deceased were found naked. PW1 stated that W had his hand on his chest and had blood oozing from his mouth and anal area and that Peter had scars on his head and scratches on his neck. She stated that the accused's house was not locked at the time he had been arrested but that no one could have entered the said house. She further stated that they have a dispute over land.

3. PW2 **BM** testified that at around 12.00 noon on the material day, her in law by the name Christine requested her to fetch water for her from the farm. She took the water and on returning she found the door open and the radio put on with loud volume. She also found the deceased missing. She inquired from the accused who informed her that she should not bother since he had seen them collecting firewood. The accused asked her to go to his house but she refused. The accused left and later returned asking for a knife. He entered the house and took the knife and went away. All this time, the deceased were still missing. Later on when PW1 returned she informed her and a search was lodged. She narrated that PW1 instructed her to search the accused's house and on searching she found the deceased's earlier mentioned clothes under the bed. On 26th October, 2014 while standing nearby the house, she saw the deceased naked bodies near the accused's house in a farm. She stated that the relationship between her family and the accused was not very good.

4. **Angeline Mbithe Mulwa (PW3)** recounted that while on her way from the market on the material day, she met the accused wearing a light grey T-Shirt with blood spots. She greeted him but he did not respond. Later that day at about 7.00 pm she received a call from PW2 asking her whether she had seen the deceased but she responded in the negative. PW3 and her husband JW later joined in on the search to no avail. On 26th October, 2014 when the search continued, PW3 stated that the bodies of the deceased had been found behind the accused's house. On cross examination, she stated that the scene where the bodies were found was open and that they must have been brought there at night.

5. **James Ngui Kombo (PW4)** was on 26th October, 2014 alerted by PW1 that the deceased had gone missing. He then instructed the village elder to assist them in the search. At around 6.00 am he heard screams and rushed in that direction where he found the deceased lying dead and naked. He then informed the police. He stated that the bodies were found lying at a farm nearby.

6. **MK (PW5)** arrived home from work and learnt from PW1 who is her wife that the deceased had gone missing. He suggested that they

search for them which they did to no avail. The search continued on 26th October, 2014 when the deceased's naked bodies were found dumped about 10 meters from his house. He stated that the deceased's clothes had been found in the accused's house and that the accused who is his younger brother was fond of harassing PW1 whenever he was drunk. He further confirmed having attended the post-mortem.

7. **Pius Ngila (PW6)** together with his colleagues Cpl. Shiundu and PC Ngethi were instructed by the OCS Machakos Police Station to proceed to the scene where the bodies of the deceased had been reported to have been found. They found the assistant chief James Kombo at the accused's compound. There they also found the deceased's naked bodies. He stated that the deceased appeared to have been strangled. They recovered clothes belonging to the children and a driving licence and identity card belonging to the accused. The items recovered were produced as follows; Pink T- Shirt (P. Exh.1), Trouser (P. Exh. 2), Green T- shirt (P. Exh.3), Black trouser (P. Exh. 4), Brown belt (P. Exh. 5), Sweater (P. Exh.6) Driving license (P. Exh. 7) and ID Card number 223xxxx in the names of Maingi Kioko Kinama (P. Exh. 8). He stated that a scene of crime officer took photographs of the bodies, the house and compound and that the bodies were taken to Machakos Hospital Mortuary.

8. **Cpl James Olago (PW7)** stated that he is a gazetted scene of crime officer and recounted that he processed some photographs of the deceased persons on 26th October, 2014. That he had been contacted by OCS CIP Nyagah. He then accompanied the OCS and PC Ngila to the scene where the bodies were and he took twelve (12) coloured photographs. He produced the photographs and certificates as P. Exhibit 9 and 10 respectively.

9. **Dr. Felix Akonde Oyombe (PW8)** testified that he was familiar with Dr. Waitera's handwriting and signature. He produced the post-mortem reports as P. Exhibit 10 (a) and (b). He stated that an inference of strangulation was made for both W and Peter. The cause of death was asphyxia secondary to strangulation for both victims.

10. The court found that the accused had a case to answer and he was placed on his defence. Dw1 testified that the deceased persons were known to him being his nephews. It was his testimony that on 24.10.2014 he drove home and on arrival he was informed that some children had gone missing. He received information that it was alleged that the clothes of the deceased were found in his house. He denied being found sleeping whilst the search party was out looking for the missing deceased persons. He testified that he was taken to the police cells and that there was no eye witness to the incident and further that he had no reason to kill the deceased and that he should be acquitted. On cross examination, he testified that he was a matatu driver and on the material day he found that the deceased had not arrived home. On reexamination, he told the court that the bodies of the deceased were found on a Saturday when he was in the police cells.

11. The defence closed its case and the parties canvassed the case vide submissions.

12. Prosecution has filed no submissions.

13. Counsel for the accused on the other hand pointed out that no eye witness to attribute the accused to the murder testified; that the ingredient of malice aforethought was not proven. Counsel submitted that the prosecution is attempting to rely on circumstantial evidence and that the circumstances did not establish the guilt of the accused. Reliance was placed on the case of **Erick Odhiambo Okumu v R (2015) eKLR**. The learned counsel Mr. Muema submitted that the court should proceed and acquit the accused after finding him innocent.

14. The burden to prove all ingredients of the offence beyond reasonable doubt falls on the prosecution in all cases save for a few statutory offences. Proof beyond reasonable doubt has however been stated not to mean proof beyond any shadow of doubt. The standard is discharged when the evidence against the accused is so strong that only a little doubt is left in his favour. **Miller v Minister of Pensions [1947] All. E.R 372**. In discharging the burden cast upon it by the law, the prosecution is required to adduce strong evidence to place the accused at the scene of crime as the assailant since he does not have the burden to prove his innocence or to justify his alibi. For a conviction to be secured, court considers the strength of the evidence by the prosecution and not the weakness of the defence raised by the accused person.

15. The four ingredients that the prosecution is required to prove in a charge of murder are that there was death of a human being and that it was unlawfully caused with malice aforethought either directly or indirectly by the accused person.

16. The postmortem report on the examination of the body of the deceased has not been objected to nor controverted. This ingredient of the offence was duly proved by the prosecution.

17. As to the unlawful nature of the death, the law presumes every homicide to be unlawful unless it occurs as a result of an accident or is one authorized by law. See **Republic v Boniface Isawa Makodi [2016] eKLR** that referred to the case of **Gusambizi Wesonga v Republic [1948] 15 EACA 65** where it was held :

“Every homicide is presumed to be unlawful except where circumstances make it excusable or it where it has been authorized by law. For a homicide to be excusable, it must have been caused under justifiable circumstances, for example in self defence or in defence of property.”

18. The deceased in this case were found to have died from strangulation. There was a suggestion by counsel for the accused that there was no evidence adduced to show that the accused was ever seen strangling the deceased and that the bodies of the deceased were found when the accused was already in custody. It was upon the prosecution to ensure that the allegation that the accused strangled the deceased was backed by supporting evidence hence I find it safe to presume that the death was unlawful. However I find that the evidential lapse will have a bearing on the identification of the perpetrator.

19. Malice aforethought is the intention to cause death. It is an element of the mind which can only be inferred from the circumstances in which the death occurred. Courts consider the nature of the weapon used, the parts of the body attacked, the number of times the weapon is used on the victim and the conduct of the assailant before, during and after the attack.

20. None of the prosecution witnesses did testify to witnessing the attack on the deceased. However there is certainty as to what was used as the murder weapon. Given the presumed force used on such a sensitive part of the body, it can safely be inferred that death was the desired outcome by whoever the assailant was.

21. There was no direct evidence linking the accused to the crime and what is available is circumstantial evidence that stained clothes were said to have been found in the home of the accused. It is the position of the law that for a court to base a conviction on circumstantial evidence it must irresistibly point to the guilt of the accused with no co-existing circumstances which would weaken or destroy that inference. For evidence to be capable of being corroboration it must:

(a) be relevant and admissible, **R v Scarrot, [1978]QB 1016;**

(b) be credible, **DPP v Kilbourne [1973]AC 729;**

(c) be independent, that is, emanating from a source other than the witness requiring to be corroborated, **R v Whitehead [1929] 1 KB 99,**

(d) Implicate the accused. **Abanga alias Onyango v Republic Cr. Appeal 32 of 1990(UR)**

22. In another case of **Republic v Kipkering Arap Koske and Another (1949)16 EACA 135,** regarding circumstantial evidence the court held that:-

“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 hypothesis than that of his guilt.”

23. The prosecution’s case suggests that the accused was the one who had an opportunity to kill the deceased because of the blood stained clothes of the deceased that were found in his house. The accused testified that he had no reason to kill the deceased and that there was no eye witness to the incident. On the other hand, the accused made an allusion that his relatives including the parents of the deceased had every reason to frame him as they were family members who had an interest in the land that was given to him. However he has not expounded on this. Section 111 of the Evidence Act, Cap. 80 of the Laws of Kenya, provides that in criminal cases an accused person is legally duty bound to explain, of course on a balance of probabilities, matters or facts which are peculiarly within his own knowledge. He did not elaborate the alleged claim of a land dispute so as to raise a presumption that the charges might have been falsely instigated against him over the said land issue. Again there was evidence by witnesses that as soon as the clothes belonging to the deceased were discovered in his house he attempted to flee away but was apprehended. There is evidence of one of the witnesses who stated that she had met the accused earlier in the day and had noticed some bloodstains on his clothes. In this regard I am not convinced by the theory advanced by the accused.

24. From the evidence on record, I am unable to find whether or not, other than the accused person, there are other persons who equally had the opportunity to kill the deceased, who were not exonerated from suspicion of having committed the offence by the prosecution, so as to leave the evidence pointing unerringly towards the guilt of the accused. However I cannot rule out the possibility that there were other persons who would have an interest in the death of the deceased and that the accused found himself as the sacrificial lamb. As such the evidence against the accused only raises grave suspicion against him in which as was rightly pointed out in the case of **Neema Mwandoro Ndurya versus Republic [2008] eKLR,** suspicion however strong cannot provide a basis for inferring guilt which must be proved by evidence. In addition the date that the bodies of the deceased were reportedly found, the accused testified that he was in custody and this further creates doubt in the prosecution case as regards identification of him as the perpetrator. The investigating officer confirmed that at the time of recovery of deceased’s clothes from accused’s house he was already in custody. Again there was no inventory prepared over the said recovery in which independent witnesses could sign so as to rule out any allegation of a frame up. It is instructive that the mother of the deceased children was not on good terms with the accused herein. It is also noted that accused’s house had not been closed and hence anybody could have gained access. All the witnesses from the area around the scene seemed to suspect that the accused must have had a hand in the murder of the two children but none of them witnessed the incident. The circumstantial evidence that emerges appears rather weak to sustain a conviction against the accused. It is trite law that mere suspicion cannot sustain a conviction. The alleged bloodstained clothes worn by the accused were not recovered and neither samples were collected from items inside accused’s house were collected for DNA analysis. Also finger prints were not dusted so as to leave no room about the accused’s involvement in the crime. The case appears not to have been properly investigated as it seems the investigators went by what the accused’s relatives told them. The investigators ought to have covered all the angles regarding the case. Looking at all these issues in totality I find that there is some doubt created in the prosecution’s case and which doubt must be given in favour of the accused.

25. In the result it is my finding that the prosecution has not proved its case beyond any reasonable doubt. I find the accused not guilty of the charge of murder and is accordingly acquitted of the said charge and is to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 27th day of January, 2020.

D. K. Kemei

Judge