



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 35 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

LILIAN CHEPCHUMBA KETER.....1ST ACCUSED

DANIEL MWACIRU GITHURE.....2ND ACCUSED

FREDRICK KOECH KIBET.....3RD ACCUSED

JUDGMENT

1. The three Accused Persons (“Accused Persons”) are charged with murder contrary to Section 203 ad read with Section 204 of the Penal Code. It is alleged that the three Accused Persons jointly murdered RKK on the 16th day of April, 2016 at Kiamunyi in Nakuru District within Nakuru County.

2. The Accused Persons pleaded not guilty and the case was set down for hearing. My predecessor, Justice Maureen Odero, heard the all the fourteen (14) Prosecution witnesses. She then put the Accused Persons on their defence but was transferred out of the station before the defence was conducted. It fell upon me to finalize the trial.

3. Upon taking over the trial, I complied with section 200(3) of the Criminal Procedure Code and the Accused Persons indicated that their wish was for the Court to proceed from where proceedings had reached. So it was. I duly informed the Accused Persons of their options on defence. They each elected to give sworn statements. The 1st Accused Person also, with the assistance of the Court, called three witnesses.

4. On the night of 16th April, 2016, the Deceased was found dead. The body was found in a bedroom in his house. The Prosecution insists that the three Accused Persons murdered the Deceased – although none of the witnesses was sure of the motive for the killing. The Defence insists that there was no homicide; that the Deceased died by suicide by hanging himself using an electric cable.

5. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

6. Given this definition of murder, for the Prosecution to prevail and obtain a guilty verdict in the case, it needed to tender evidence beyond reasonable doubt of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

7. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- a. *Intention to cause death of or grievous harm to any person whether that person is the one who actually died on not;*
- b. *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;*

c. *Intent to commit a felony; or*

d. *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.*

8. The task of the Court is simple enough: it is to decide if on the evidence adduced, the Prosecution has established the three elements of the offence of murder beyond reasonable doubt.

9. Nine of the fourteen Prosecution witnesses who testified were at the scene where the body was found at some point on the night of 16/04/2016. However, none of them testified to seeing the alleged murder. According to the Investigating Officer, Corporal Francis Mulei, the decision to charge the three Accused Persons was based on evidence of opportunity (the three were the only adults who were at the homestead on the night the Deceased died – the other two persons present having been minors at the time – AKC (18 at the time) and IKC (15 at the time)). The Investigating Officer ruled out suicide for reasons I will explore later in this judgment.

10. From the evidence that emerged at the trial, other than AKC (PW10) and IKC (PW13) who were with the three Accused Persons throughout the night of the incident, it would appear that PC Moses Musau (who testified as PW8) and Senior Sergeant Rhoda Kangau (who testified as PW9) who were the first at the scene. Both testified that they received a report of a suicide incident through the Kiamunyi Patrol Base while on patrol. The report had been made by the 3rd Accused Person. They rushed to the Patrol Base where the 3rd Accused Person led them to the Deceased's house at Mti Moja. On getting there, they proceeded to the bedroom where they found the body of the Deceased lying on the floor.

11. PC Musau testified that he found a piece of extension cable tied to the cross bar of the wardrobe. He recovered another piece of the extension cable with the plug/socket base in the Sitting Room of the house near a sofa set. The body was by the door to the bedroom about 3 metres away from the wardrobe. PC Musau did not notice any signs of a struggle in the bedroom.

12. SS Kangau confirmed that she saw the piece of cord still tied to the rail of the wardrobe while the other piece was in the sitting room. She testified that she inquired who had cut the cable and was told that it was the son of the Deceased (Andrew). SS Kangau thought that she saw signs of a struggle as clothes were scattered in the bedroom all over the bed. However, she did not see any physical injuries on the Deceased. She called the Scenes of Crime personnel to process the scene. The Deceased's brother (PW3) called her while she was at the scene and told her not to remove the body until the family had arrived. She obliged.

13. The first family member to arrive was Dennis Keter. He is the Deceased's brother. He testified that on the material day, he received a call from his mother to go check on the Deceased and his wife. The mother (PW2) had told him that she had received a call from the 1st Accused Person that the two were fighting. Dennis, who testified as PW3, is an Administration Policeman in Solai. On receiving the news, he tried to call the Deceased but was unsuccessful. He set out for the Deceased's home. On getting there, he found the Police had already arrived. He testified that he found the body lying against the wardrobe in the bedroom. He insisted that the 1st Accused had told him that she had removed the cable cord from the Deceased's neck. He said he saw no sign of commotion in the room.

14. James Rotich Kosgei was the next family member on the scene. He is the Deceased's brother-in-law. He lives in Eldama Ravine. He was informed by his wife that she had received a call that the Deceased was dead. They both rushed to his house. He arrived at around midnight. He found four Policemen. Dennis had already arrived as well. He testified that he found the body lying on the floor next to the door. The body was fully dressed except for the shoes. The only visible injury he saw was a swelling on the left side of the neck. He was categorical that the bedroom was very neat and well arranged. He saw the piece of cable cord on the wardrobe rail.

15. The Deceased's parents also went to the scene after receiving a call. The father, Ramis Arap Keter, testified as PW1. He testified that his son, the Deceased, had called him earlier on the material day at about 11:00am complaining about his wife's behavior. He said that his son had periodically complained that his wife was unfaithful and that she tended to leave home for periods at a time without any explanation. On receiving the news about the death, he travelled to the Deceased's home. He testified that by that time, the Police had taken the cord but the body was still there. He said he saw an injury on the Deceased's head. Later on, he was present for autopsy and identified the body.

16. The Deceased's mother, Joyce Keter, testified as PW2. She confirmed that she received a call from the 1st Accused Person that evening complaining that the Deceased was drunk and being violent and abusive. She promised to call the Deceased but the Deceased did not pick up the call. Later on, the 1st Accused Person called her back and told her that she (1st Accused Person) was going to report to the Chief. Joyce then called Dennis and requested him to check on the couple. She said that she later received a call from the 3rd Accused Person who told her: "Poleni amekufa." She and her husband, then, made arrangements to travel to the Deceased's house. She testified that she found the body of the Deceased lying face upwards in the bedroom. She insisted that during her phone conversation with the 1st Accused Person, she never told her that the Deceased was threatening to commit suicide.

17. Alex Kiprop Keter is also a brother to the Deceased. He also went to the scene arriving at around 11:00pm that day. He saw the body lying on the ground. He also saw an electric cable about half-a-metre long lying on the bed. He did not see any injuries on the body. Alex, who testified as PW5, also went to the autopsy and was an identifying witness.

18. Japheth Tarus Bunei, an uncle to the Deceased, was an identifying witness for autopsy. On cross-examination, he said that he saw no injury on the body of the Deceased. He only saw a mark of a rope on the neck. He testified that he had requested Dr. Ngulungu to attend the autopsy on behalf of the family. Dr. Ngulungu was present and jointly performed the autopsy with Dr. Anthony Wainaina who was doing the autopsy on behalf of the State. Mr. Bunei testified as PW6.

19. Based on this set of facts and circumstances, the family of the Deceased was persuaded that the death of the Deceased was a homicide

and not a suicide. So did the investigators in the case. To prove the alleged homicide, the autopsy report would prove as critical as the accounts of those who were present during and immediately following the incident.

20. Two doctors – Dr. Mutheu Ngulungu and Dr. Anthony Wainaina – performed the autopsy. They co-signed the Post-Mortem Form which was produced as Exhibit 2. Dr. Ngulungu had been privately procured by the family of the Deceased while Dr. Wainaina represented the State. The conclusion by both doctors was that the cause of death was “asphyxiation due to cord pressure on the anterior of the neck in a body with multiple bruises whose circumstance (sic) is to be thoroughly investigated.”

21. What does this mean in plain English? Dr. Ngulungu testified that even though they found multiple bruises on the body of the Deceased, it was plain obvious to him that the cord pressure to the anterior of the neck which caused the asphyxiation was as a result of manual strangulation. He expressly ruled out suicide or hanging. This was because, he explained, the groove of the neck would not run horizontally in the case of a hanging. In the case of a hanging, there would be an upward force or trend on the groove of the neck.

22. Dr. Wainaina, who testified as PW11, said that he concurred with Dr. Ngulungu’s autopsy analysis. Like Dr. Ngulungu, he explained that his view was that the cord pressure was caused by strangulation not hanging because the groove ran horizontally across the neck and did not ascend upwards. He, however, conceded that he found a hyoid fracture which is a rare fracture which can be caused by strangulation or by hanging.

23. Despite these findings by the two pathologists, the Investigating Officer, Corporal Francis Mulei, was not persuaded that the cause of death was manual strangulation. He thought that the Deceased died from the multiple injuries to the stomach and body. Corporal Mulei testified that he ruled out suicide for two reasons. First, he testified that his professional opinion was that the electric cable which was allegedly used for the suicide was too short to go round the neck of the Deceased and for it to be tied to the rail as alleged. Second, Corporal Mulei’s opinion was that at 120kgs in weight, the cable could not have supported the weight of the Deceased without snapping.

24. Two other Prosecution witnesses gave two more reasons why they ruled out suicide: that the wardrobe rail/rod to which the electric cable was allegedly tied was too weak to support the weight of the Deceased and that the rail/rod was too low in height for the Deceased, standing at 6 feet and 2 inches to have hanged himself. These opinions were expressed by Dennis Keter (PW3); James Kosgei (PW4) and Senior Sergeant Rhoda Kangau (PW9).

25. Where does leave things? Did the Prosecution marshal evidence beyond reasonable doubt to prove that the three Accused Persons murdered the Deceased? Alternatively, did the suicide theory introduce sufficient reasonable doubts to forestall a guilty verdict?

26. It is instructive that two Prosecution witnesses expressly disproved the murder theory. These were AKC (PW10) and IKC (PW13). Both were children of the Deceased and they gave evidence which was directly in opposition to the Prosecution theory. The Prosecution did not deem it necessary to adjudge them hostile witnesses and then cross-examine them. In the end, therefore, we have their testimonies which tell a version of the story which is consistent with the Defence theory. Indeed, in all material aspects, PW10 and PW13 amplify the narratives given under oath by the three Accused Persons.

27. The narrative given by the five individuals (the three Accused Persons; PW10 and PW13) is, roughly, the following. The 1st Accused Person and the Deceased arrived home at around 7:00pm. The 1st Accused Person was driving the family vehicle. The 2nd Accused Person opened the gate to the home. The Deceased was visibly drunk. He staggered into the house. The 1st Accused Person had bought some “take away” food from Gilanis Supermarket for the family. The family members served and started eating. The Deceased apparently noted that the packaging of the food was from Gilanis and promptly accused the 1st Accused Person, his wife, of accepting to be bought food by “other men.” He picked up the food and was, apparently, going to throw it to the dogs. The 1st Accused Person stopped him. The Deceased became more agitated. He pulled the cable from the TV from its socket to prevent the 1st Accused Person from watching TV. He then climbed on the ironing board. It is not clear what he was reaching out for. He fell with a thud, hitting his head on the washing machine.

28. It was at this point that Andrew (PW10) rushed to the corridor upon hearing the thud. Upon confronting his father, the Deceased abused him – calling a failure. A verbal altercation ensued. The 1st Accused Person advised her son, PW10, to step outside to prevent an escalation. At that point, fearing for her life and/or limbs – allegedly based on past experience – the 1st Accused Person also agreed to go outside the house. They left the 2nd Accused Person and Isaiah (PW13) in the house. These two soon also left the house – frightened by the Deceased’s ominous threat: “mtaona”. They sat by the gate until the 3rd Accused Person arrived.

29. Andrew (PW10); the 1st Accused Person and the 3rd Accused Person all give an account that while outside by the gate, the 1st Accused Person called the 3rd Accused Person, her brother, to come to her rescue. He arrived shortly thereafter.

30. While by the gate, the 1st Accused Person, in a version concurred to by the 2nd Accused Person and PW10 and PW13, says that she asked the 2nd Accused Person to go inside the house to pick up her certificates. She says she did this because she was afraid that the Deceased would burn the certificates as he had done in the past. The 2nd Accused Person could not immediately find the certificates forcing him to call the 1st Accused Person to ask for clarification. Meanwhile, the 1st Accused Person ran into the house to get a dress as well.

31. The 1st Accused Person testified that while in the house she noticed the Deceased hanging as if suspended by the wardrobe in the bedroom in a bended position. At first, she testified that she thought it was a bad prank by the Deceased so that he could capture her and beat her up. She says upon seeing the electric cord, she shouted to her sons to go and help out. At that point, the 2nd Accused Person ran and cut off the cord and the Deceased fell to the floor.

32. The 1st Accused Person, in a version supported by the other two Accused Person and PW10 and 13, testified that at that point, they all ran

out of the house and drove to the Chief's camp to report. They went in the 3rd Accused Person's vehicle. On getting there, they found a lady who recorded in the Occurrence Book (the extract of which was produced as Defence Exhibit 4). The lady Officer, then, told them to go report at the Kiamunyi Road block where they would be given Police Officers to accompany them. They headed there. However, at the Road block, they found two Police Officers who told them that they could not accompany them due to shortage of officers. They allegedly told them to sleep elsewhere and then call the Police in the morning.

33. A neighbour advised the group to go report to the Mzee wa Nyumba Kumi (Village elder). The Village elder stated that that was not within his mandate. He reportedly called the Police. Eventually, the Police went to the scene. This was PC Makau and SS Rhoda Kangau.

34. This was the version of events given by the Accused Persons and two Prosecution witnesses (PW10 and PW13). If believed, it would suggest that the death of the Deceased was by suicide since he was left alone in the house. It is important to note that all the five people who were in or around the house at the time concurred in this version of events.

35. On the other hand, the other Prosecution witnesses – including the Investigating Officer and the Scenes of Crimes officer (who testified as PW12) testified that the evidence suggested that the Deceased did not commit suicide but was murdered. This was supported by the evidence of the two doctors who performed autopsy although Dr. Wainaina seemed to leave some trifle possibility that the death could have been by self-hanging.

36. To buttress its suicide theory, the Defence produced evidence to show that the Deceased had the tendency to over-indulge in alcohol; and that when he did so he was often violent. The 1st Accused Person testified how the Deceased attacked her on several occasions including knocking out her four teeth and burning her with hot iron box. On at least two recorded occasions, the 1st Accused Person reported assaults by the Deceased to the Police which were recorded on Police OBs. The OBs were produced as evidence and were uncontroverted.

37. The evidence of the Deceased's violent behavior as narrated by the 1st Accused Person was corroborated by the 2nd Accused Person as well as the Deceased's two children who were Prosecution witnesses – Andrew (PW10) and Isaiah (PW13).

38. There is no question that the Deceased died. His body was found lying in a bedroom in his house. All Prosecution witnesses (as well as the Accused Persons) confirmed seeing the body – the two doctors confirmed performing an autopsy on it. There is, however, a major disagreement between the Prosecution and the Defence on how the death occurred.

39. It is obvious that no one saw the Deceased being murdered. The Prosecution, therefore, relies solely on circumstantial evidence. As I understand it, the hinge of the link between the death and the Accused Persons is the opportunity they had coupled by the Prosecution's murder theory. In other words, to succeed, the Prosecution will have to persuade the Court that only the three Accused Persons had the opportunity to kill the Deceased; and that the Deceased died of homicide not suicide.

40. As rehashed above, the Accused Persons vehemently deny killing the Deceased and insist that he committed murder. The Defence sought to support its suicide theory with the Deceased's history. This included not only his violent drunk behavior explained above, but also previous attempts at suicide. The Defence also adduced evidence that there are suicidal tendencies in the Deceased's family. While the Deceased's brother died of suicide, the Deceased's family strongly scoffed at the attempt to establish such a pattern. Without more medical evidence on such a pattern, I would agree that the mere fact that the Deceased's brother committed suicide does not establish a congenital proclivity for suicide in the family.

41. However, that does not end the analysis in this case. This is a criminal case. While we have two competing theories, the onus is on the Prosecution to prove its case beyond reasonable doubt.

42. It is true that circumstantial evidence is, often, the best evidence. So said the Court of Appeal in *Neema Mwandoro Ndurya v. R [2008] eKLR*, where it cited with approval an English Case, *R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20* where the English Court stated that:

Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics.

43. In *Joan Chebichi Sawe versus Republic [2003] eKLR* the principles that guide the Court in evaluating circumstantial evidence were laid out in three tests as follows:-

- a. *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*
- b. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
- c. *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.*

44. Earlier on, *Kipkeriing Arap Koske versus R. [1949] 16 EACA 135*, long considered a *locus classicus* on this issue, had compressed the principles into two thus:

- (a) *The inculpatory facts must be incompatible with the innocence of the accused.*
- (b) *The facts must be capable of no other conclusion or explanation except the guilt of the accused.*

45. However, as several Courts have pointed out, even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. As the Court of Appeal remarked in **Simon Musoke versus Republic [1958] EA 715** while citing **Teper versus R. [1952] AC 480,489** before drawing the inference of an Accused Person's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

46. Applying these principles to the present case, can we truly say that the “*circumstances taken cumulatively... 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 Persons and none else*”?

47. I am not persuaded that this is the case here. I say so for the following reasons.

48. First, it is a powerful thing that two of the Prosecution witnesses – and the only two who were present during the span of time when the incident happened – strongly and directly contradicted the Prosecution narrative. This is, of course, PW10 and PW13. They both told a starkly different narrative in which they completely agreed with the Defence version of events. This, in itself, is enough to create a reasonable doubt given that their version of events was not challenged at all by the Prosecution.

49. Second, the “opportunity theory” by the Prosecution is belied by the fact that two of those present when the events of 16/04/2016 happened. Again, this is, of course, PW10 and PW13. Corporal Mulei explained that they made the decision to charge the three Accused Persons because they were the only adults in the vicinity when the death of the Deceased occurred. The implication is that the three of them had the opportunity to kill the Deceased. That theory appears illogical considering that PW10 – who was 18 years old at the time – and PW13 – who was at least 15 years old at the time – were present as well and were, at all material times, in the company of the three Accused Persons. Why were these two not charged as well going by that theory? The Investigating Officer's theory that he only charged the adults appears to make little sense given that the age of (absolute) criminal responsibility in Kenya is twelve years. This, further, gives some legs to the Defence theory that the murder charge was only preferred against the Accused Persons at the instance of the family of the Deceased in retaliation for the 1st Accused Person's supposed intriguence for daring to stop the Deceased's family from grabbing their matrimonial property following the death of the Deceased. In support of this collateral theory, the Defence pointed to three events: one, that it took more than two months for the charges to be brought; two, that the charges only came after the 1st Accused Person's lawyer fired a letter demanding that the family returns the vehicle they had taken; and three, that the charges came after the 1st Accused Person reported to the Police that the family had visited her home and attempted to make off with clothes and other personal effects belonging to the Deceased. She produced an OB entry to substantiate the last.

50. Third, as things stand, one cannot say that the circumstantial evidence ineluctably points to guilt by the three Accused Persons only. This is because, as discussed above, it appears that there is a possibility that the Deceased committed suicide. Consequently, the Prosecution needed to do more to exclude that possibility. One, no tests were carried on the electric cord to confirm if, indeed, it had come into contact with the Deceased's skin or blood. A negative finding would have excluded the suicide theory. Two, no simulation or test was done to determine if, indeed, the electric cord was indeed too short to wrap around the neck of the Deceased sufficiently to hang him by the neck. Again, a negative finding of this would have excluded the suicide theory. Three, no simulation or test was done to determine if the wardrobe rail/rod could, indeed, take the weight of the Deceased as the Prosecution claimed it could not. Again, a negative finding would have inexorably excluded the suicide theory. As it is, all these claims were left to the conjecture of the witnesses rather than scientific certainty. This definitely robbed the Prosecution theory of the inculpatory stridency it needed to establish its case beyond reasonable doubt.

51. In my view, therefore, the circumstantial evidence was insufficient to establish that the death of the Deceased was a homicide perpetrated by the three Accused Persons. I will, as the law requires, give them the benefit of considerable doubt established by the facts and circumstances. It is true that the evidence casts a shadow of suspicion that the death could have been a product of murder. However, that is not enough. It is trite that suspicions, however strong, cannot take the place of evidence (See **Sawe v R [2003] KLR 364** where the Court of Appeal held that “*suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.*”).

52. In the circumstances of this case I conclude, upon appropriate evaluation of the evidence presented that it can properly be said that the “*inculpatory facts are [not] incompatible with the innocence of the [three Accused Person], and [are] capable of explanation upon ... other reasonable hypothesis than that of [her] guilt*” to paraphrase **R v Kipkering Arap Koske & Another 16 EACA 135**. The available evidence does not compellingly and ineluctably point to their guilt.

53. It is, therefore, my finding that the Prosecution has failed to prove beyond reasonable doubt all the three elements of murder against the three Accused Persons. Consequently, I find that the three Accused Person are not guilty of the offence of murder of RKK. I, accordingly, acquit all the three Accused Persons under section 322(1) of the Criminal Procedure Code. They shall be set at liberty unless otherwise lawfully held in custody.

54. Orders accordingly.

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

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JOEL NGUGI

JUDGE