



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL CASE NO 10 OF 2018**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MARTIN NJUE NJERU.....ACCUSED**

**JUDGMENT**

1. The Accused person is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars state that on the night of 25<sup>th</sup> and 26<sup>th</sup> January 2018 at Kahawa Wendani Estate in Ruiru Sub-County, Kiambu County, he murdered Ndatabaya Alain. The Accused denied the charges and was represented by Mr. Farah.

2. Through six witnesses, the prosecution presented the following case. The deceased, Ndatabaya Alain was a Congolese national living in Kenya. He was an employee of Cap Hill Security Services operated by **James Ogal (PW3)**. Cap Hill Security had been contracted to provide security services at the residence generally referred to as “**Peter’s Flats**” at Kahawa Wendani. There was a small guardroom on the ground floor right below the staircase which served as the guard’s station/residence. The caretaker was **Kennedy Kinuthia Wanjiru (PW1)**. Starting in October 2016 to December 2017 the Accused, then an employee of Cap Hill Security Services, was deployed by **PW3** at the flats as a security guard. However due to complaints made to **PW3** concerning his conduct, the Accused was dismissed and replaced by the deceased. However, the Accused had persisted in visiting the flats and creating disturbances by claiming that certain items he had left in the guard room were thrown away by the deceased.

3. On the morning of 26.1.18 **PW1** was drawn outside by one resident who reported a commotion in the guard room on the ground floor. Upon entering the guard room, he found the Accused person lying on a seat with some loosely tied elastic strips around his hands and on being questioned responded: “*Ni kubaya* or “things are bad”. **PW1** tried calling the deceased on his phone and upon stepping out was directed by gathered residents, to a trail of blood leading to bathroom right opposite the guard house. In there lay the deceased face-down with his head covered by a heap of clothes.. Police were called in. The body lay in a pool of blood and upon being uncovered revealed deep head injuries. The body was photographed by **Paul Njehia Karungo (PW5)**. It was then removed. The Accused was placed in custody.

4. On 30.1.18 the pathologist, Dr. **Dorothy Njeru (PW 4)** carried out the post mortem examination which revealed an injury with depressed fracture on the right side of the head and bleeding over the brain as well as loss of brain matter. **PW4** concluded that death was due to the head injury secondary to blunt force trauma. The Accused was charged.

5. When placed on his defence, the Accused elected to give a sworn statement. He testified that he was a casual labourer but was previously employed as a watchman. That on the evening of 24.1.18 he was having a drink at a club called Backyard, Kahawa. Then **PW1** who worked as a caretaker at his previous place of work joined him promising him a job next day and a place to sleep that night. He did not know what happened thereafter as he next found himself in his former guard room at Peter’s flats with his hands trussed. Unable to free himself, he screamed and one resident called **PW1** who freed him and also called police. He said he did not know the deceased, nor see him in the room where he was.

6. The Court has considered the evidence tendered and the parties’ respective submissions. There is no dispute that the Accused had for some time prior to the offence been employed as a guard at Peter’s flats at Kahawa Wendani; that he had been dismissed and replaced; and that on the material morning he was in the guard room at Peter’s flats with wire around his hands. There can be no dispute based on the evidence of **PW1** and photograph by **PW5** that the deceased’s body was found lying in a bathroom opposite the guardroom on that morning, and the Accused despite initially denying knowing the deceased admitted during cross-examination that he had lost his job to the deceased.

7. The court must determine whether the Accused, of malice aforethought caused the death of the deceased. First of all, the cause of death of the deceased is not in dispute. He had been struck on the head with a blunt object which caused not only a depressed skull fracture and bleeding but also oozing of brain material. Whoever inflicted these injuries must clearly have intended to cause death or grievous harm and malice aforethought can be deduced from the severity and location of the injury.

8. Section 206 of the Penal Code states that:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

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- a) an intention to cause the death of or to do grievous harm to any person whether that person is actually killed or 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, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that may not be caused;**
- c) ....**
- d) ....”**

9. With regard to the Accused’s culpability in respect of the unlawful acts leading to the death of the deceased, the defence counsel had in submissions on case to answer, also relied on at the close of the defence case, correctly submitted that the prosecution case rests primarily on circumstantial evidence. No person witnessed the assault that resulted in the death of the deceased.

10. The prosecution relied on evidence surrounding the offence such as the dismissal of the Accused and his replacement by the deceased in the material period, the Accused’s response thereto and subsequent unwelcome visits to his former place of work and, finally, his undisputed presence in the deceased’s room on the morning of the discovery of the fact of the murder of the deceased.

11. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR**, the Court of Appeal had this to say on this point:

**“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -**

**“It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.”**

See also **Musili Tulo v Republic Cr. App. No. 30 of 2013**.

12. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated: -

**“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:**

**“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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; 9iii) 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.**

(see also **Sawe v Republic (2003) e KLR** and **GMI v R Cr. App. No. 38 of 2011**).

**In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.**

(see **Teper v R [1952] ALLER 480** and **Musoke V R [1958] E.A 715**). In **Dhalay Singh v Republic, Cr. App. No. 10 of 1997**, this court reiterated this principle as follows:

**“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”**

13. In **Neema Mwandoro Nduzva v R [2008] e KLR** the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

**“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.”**

14. In its earlier decision in **Mwangi and Another v Republic (2004) 2 KLR 32**, the Court of Appeal exhorted that:

**“In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge”**

See also **Regina v Exall and Others (1866) 176 ER 850** emphasizing the view that all pieces of circumstantial evidence ought to be viewed as individual strands of a cord which when combined together, constitute a rope.

15. Concerning the events preceding the death of the deceased herein, **PW3** testified that he had dismissed and removed the Accused in December 2017 from being a guard posted at Peter’s Flats, arising from complaints touching on his conduct at work. There is no dispute that the deceased was subsequently posted as a guard at the said flats. According to **PW1** and **PW3**, the Accused had despite his removal continued to visit the premises. These visits were unwelcome as the deceased had complained to **PW3** who had warned the Accused to desist. **PW1** stated that the Accused had during one of the visits complained that the deceased had disposed of some items, that is boots, that he had left behind at the guard room.

16. In **PW1**’s words, the Accused had created disturbances during his post-dismissal visits to the flats. **PW1** also complained to **PW3** about the visits. On this aspect, both **PW1** and **PW3** were not shaken during cross-examination. None appeared to have any personal animus against the Accused person having dealt with him merely in his capacity as a guard stationed at the flats and later dismissed. Their accounts appear credible and were not in any way contradicted by the Accused’s defence which dwelt on the alleged events of 26/1/18. Indeed, if the latter account was to be believed, **PW1** was friendly towards the Accused and even bought him a drink. The court having looked at the evidence by **PW1** and **PW3** is persuaded that it is credible, and points to the fact that the Accused was unhappy he had lost his job at the flats to the deceased.

17. It is my considered view that the Accused had developed hard feelings towards the deceased as evidenced by his accusations after he was dismissed. There is no dispute that the Accused was found in the guard room occupied by the new deceased watchman on the morning of 26.1.18. **PW1** stated that on being called by a tenant he went to inquire:

**“...when I went to the (guard) room, I saw the Accused in there. He was trussed on both hands with black elastic bands (MFI 1). He was trussed with the bands loosely over his hands and lay on a sofa set. He had a piece of metal bar under his arm. He said “Ni kubaya” meaning “things are bad”. I asked what he was doing there since he had been sacked. I called the watchman who was then working for us while the bands on the Accused just came off ... The calls were unanswered.”**

18. The witness then recalled how on stepping out of the room he met some tenants who showed him blood traces leading to the bathroom directly opposite the guard room where he found the deceased lying face down. He continued to state that when he had questioned the Accused at first, he had said that the watchman had gone out, could not tell how he (Accused) ended up trussed but that he had spent the night in the guard room. During cross-examination the witness reiterated this account and further stated that:

**“Yes, the Accused was in the house of the Deceased with arms loosely trussed with elastic band ... Before going to call watchman, I untrussed (him). Band came off easily. He got out of room and stood on compound. I asked him to leave. He had earlier answered my inquiries by saying the deceased had gone out with a certain lady.”**

19. The Accused’s explanation for his presence in the deceased’s room on the material morning is that **PW 1** had bought him alcohol the previous night and the next thing he knew is that he was in the guard room on the next day, tied up with wires. These assertions were never put to **PW1** during cross-examination. And while it may be true that a sound or cry by the Accused attracted the worker in flat No. 12 who in turn called **PW1**, the Accused’s claim that he was tied up tightly and could not untruss his hands prior to that are somewhat false. **PW1** said that the elastic bands, which were produced in court, were loosely hanging on the Accused’s hands and came off easily. The court having looked at these bands could not conceive them, being elastic in nature, sufficiently binding an average person such as the Accused.

20. The Accused’s explanation defies logic and sounds incredible. His claims to have not seen the deceased or known him were displaced by **PW1**’s evidence on these matters and the Accused’s words when initially questioned by **PW1**. Indeed during cross-examination, the Accused admitted that he knew the deceased had taken over his job. The location of the deceased’s body was a bathroom right opposite the guardroom where the Accused was. According to **PW5** the deceased’s room was in disarray with stuff scattered, and depicted a struggle and that right outside the room on the floor, was a pair of shoes and a wooden stick near a blood stained spot. **PW1** and **PW6** testified to seeing blood stains on the floor leading to the bathroom, and according to **PW6**, with evidence of dragging of body from guard room to the bathroom.

21. The question arising from all the foregoing is this .

What is the explanation for the Accused’s presence in the deceased’s room just across from the bathroom where the deceased lay dead? His answers to **PW1** on the material morning do not suffice. Secondly, his purporting loose trussing over the limbs in the circumstances suggest an intention to portray himself as incapable of using his limbs. This cannot be true as the elastic bands came off easily when **PW1** tied them. If we believe his evidence, the Accused does not know who may have taken him to the room and made an attempt to bind him even

though he was last conscious while in the bar with **PW1**.

22. The Accused's explanation for how he ended up at the deceased's room is incapable of belief. His purported trussing and alleged loss of consciousness could only serve one purpose in this case, namely to suggest that other persons and not himself must have harmed the deceased. Section 111 of the Evidence Act provides that:

**“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—**

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

23. In this case, the Accused has given an explanation that is incredible and incapable of belief. Lesiit J in **Republic v. Nicholas Ngugi Bangwa (2015) e KLR** relied on the Court of Appeal case of **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”.**

24. There is no requirement that in a case of murder to prove motive but it is an important element in a case resting on circumstantial evidence – see **Libambula V Republic [2003] KLR 683**. The Accused's obvious and deliberate lies to this court and deceitful conduct on the material date provide corroboration to other evidence in this case. The Accused person was angered that he had been dismissed and replaced by the deceased and he repeatedly visited his former place of work, on occasion making accusations against the Deceased. He was admittedly in the room of the deceased on the night of the murder and could give no credible explanation for his presence then as now, his disguise of being bound having collapsed.

25. The proven circumstances taken together leave no doubt that indeed the Accused person murdered the deceased before dragging him to the bathroom adjacent to the guard room. That is the only explanation for his presence in the deceased's room on the material morning and the putting on of the pretense he held up to **PW1** and to this court, namely, that he somehow fell unconscious and ended up in the guard room with his limbs tied up. I am satisfied beyond any reasonable doubt of the Accused's guilt and will convict him accordingly.

**DELIVERED AND SIGNED IN VIRTUAL COURT ON THIS 12<sup>TH</sup> DAY OF JUNE 2020 .**

**C. MEOLI**

**JUDGE**

**In the presence of:**

**Mr Mokua for the DPP**

**Mr. Farrah for the Accused**

**Accused present**

**C/A Kevin**