



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL CASE NO 26 OF 2016

REPUBLIC.....DPP

VERSUS

PAUL MWANGI KAMAU....ACCUSED

JUDGMENT

1. The Accused herein, **Paul Mwangi Kamau** is charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The Information states that on the night of 30th March 2016 at Nderi estate Kikuyu Sub-County, Kiambu County, he murdered **Joel Kamwara Kamau**.

2. He denied the charge and was represented by Mr. Tumu. Through five witnesses, the prosecution presented the following case. On the morning of 30th March 2016, **APC Cyrus Kivindu (PW1)** and **Snr. Sgt. Ezekiel Keroro (PW4)** both attached to Nderi **AP's** Post were on duty. At 5.00 a.m. they received a call from an unknown member of the public informing them of the presence of an injured man lying inside a construction site at Wangong'u area, Nderi. They proceeded to the site and found the caretaker who is the Accused in this case. The deceased in this case, Joel Kamwara Kamau lay in the yard on his back, facing up, was growing and unconscious. There was a noticeable rectangular bruise on his abdomen. Police removed him from the scene to Tigoni hospital while placing the Accused in custody. During post-mortem Dr. Peter Ndegwa (**PW2**) noted the rectangular bruise on the right-side abdomen and blunt head injury. His conclusion was that death was due to blunt head injury.

3. Upon being placed on his defence, the Accused made a sworn statement. To the effect that during the material period, he was working as a caretaker at the construction site at Zambezi area owned by Joseph Njung'e, now deceased. That on the night of 29th March 2016 he was in his quarters on the site when he heard a loud thud. He got out to inquire and found a male intruder lying unconscious next to the perimeter wall of the site. He rang his employer who was reluctant to visit the scene at night and instructed him to call the local AP Post. When he did so, Administration Police Officers from the post came to the site. He was arrested. He denied having assaulted the deceased.

4. The court has considered the evidence on record and submissions of the parties. The key facts of the case are not in dispute. The deceased was on the morning of 30th March 2016 found lying unconscious in the construction site where the accused worked as caretaker. His injuries as well as the cause of death are not in dispute. The injuries described in the postmortem report include a rectangular bruise on the abdomen and blunt head injuries. The cause of death is indicated to be cardiopulmonary arrest due to head injury due to blunt force trauma. If indeed any person inflicted these injuries on the deceased, malice aforethought as defined in Section 206 of the Penal Code would be imputed.

6. The sole question for determination in this case is whether the Accused person inflicted the fatal injuries on the deceased. The prosecution case primarily rested on circumstantial evidence the key planks thereof being the presence of the injured deceased in the enclosed construction site on the material morning and the fact that the Accused person was the only other person present at the scene. The first officers to visit the scene were **PW1** and **PW4** and although they claimed to have been called by a member of the public, the said caller was never unmasked nor did the investigating officer **CPI Endung (PW5)** conduct any serious inquiries to establish how the deceased, reportedly, a resident of Wangong'u area not far from the site, landed at the building site. Not even photographs of the scene were taken nor local residents questioned by the investigating officers.

7. It may be true that human bodies do not fall from the sky, but in the circumstances of this case, the Accused has given an explanation of what happened on the material night and suggested how the deceased may have ended up on the site, with serious injuries, namely, that the injuries sustained by the deceased could very well have resulted from a fall, possibly as the deceased scaled the almost ten foot-high perimeter wall of the site. Thus, the mere presence of the Accused at the scene of injury does not preclude the possibility that indeed the deceased may have scaled up the perimeter wall from outside and fell down on some hard material wont to be on a construction site, such as stones, thereby sustaining the rectangular injury to the abdomen and blunt injuries to the head.

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

probative value of circumstantial evidence:

“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.**

9. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court is capable of supporting 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.”

10. The explanation offered by the Accused suggests that the deceased may have died from a fall after scaling the high perimeter wall surrounding the site. The explanation may or may not be true but taken together with medical evidence establishes a circumstance that weakens the inference of guilt on the part of the Accused person. It creates reasonable doubt as to the culpability of the Accused. He is therefore entitled to an acquittal. The Accused is hereby acquitted and set at liberty forthwith unless otherwise lawfully held.

DELIVERED AND SIGNED ON THIS 30TH DAY OF JULY 2020 .

C.MEOLI

JUDGE

In the virtual presence of:

Accused: present

For the Accused: Mr. Tumu

For the DPP: Ms. Oyagi

C/A: Kevin Ndege