



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO.15 OF 2014

REPUBLIC.....PROSECUTOR

~VERSUS~

PAUL MUNDUI KARURI.....ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 31st day of May, 2014 the accused murdered Lucy Kagendo Giti at Karandi trading Centre in Mathira West Sub-county within Nyeri County; the accused pleaded not guilty to the charge;

The prosecution's case

2. The Prosecution called five (5) witnesses. **PW1**, Julia Kanyua, was the deceased's grandmother. She testified that on 23 June 2014 at around 10.00am she was called by one Rananu, Lucy's neighbor, who informed her that Lucy had been killed.

3. **PW1** called Lucy's mother, Kacheri, who came with her father. Together they went to Kiamaritha Police Station. The Police took them to the house where Lucy had been killed. There was nobody in the house but it looked like there had been fighting because things were scattered all over.

4. **PW1** stated that they then proceeded to the mortuary and found Lucy's body. She couldn't remember the name of the mortuary. The body had an injury inflicted by a metal bar. She did not know the cause of death. Although they were not married Lucy lived with the accused prior to her death. The deceased had a child called Gathoni; the deceased and the accused loved each other very much.

5. **PW1** testified that she had seen Lucy two weeks before she was killed. Lucy informed **PW1** that she had moved from Timau to Kiamariga to start a business with the accused; that there was no sign of problems or animosity between the accused and the deceased and that **PW1** never saw the two fight.

6. Under cross-examination she turned out not to be a credible witness. She stated that she saw a metal bar with blood at Lucy's house and formed an opinion that it was the object used to kill her. According to her it was the accused who killed Lucy. Although she visited the crime scene she couldn't remember the name of the place; and she stated that she hadn't told the Police that the accused and the deceased lived together. She also didn't state in her statement that Lucy had moved from Timau to Kiamariga; that she knew the accused because she used to see him around Timau but later retracted and stated that she had never seen him and that the statement was written for her.

7. **PW2** was a Police Officer, his evidence was that on 31st May 2014 he was on duty at Kiamariga Police Station when he received a report that there was a dead body at Karandi Trading Centre near Karandi Mountain Road Lodge; he went to the said scene together with one Sgt Kikego and PC Nganga and found a dead body lying on the edge of the road, a few metres from Karandi Trading Centre and it was covered with a blanket; that members of the public had surrounded it.

8. **PW2** informed the Deputy DCIO Karatina, Mr. Nzioka, and Scenes of Crime Unit, Nyeri, of the incident and the Deputy DCIO began the investigations; and on how he had been informed by members of the public that the deceased and the accused had been seen fighting the previous night and that some blood stains were discovered a few metres near a foot path; samples of the blood stains were taken by the Deputy DCIO and kept it as an exhibit; the scene of crime unit uncovered the body and found two cuts, one on the head and another on the face; the officer took photographs of the scene and the body was taken to Karatina Mortuary.

9. At 4.45pm on the same day **PW2** received information that the accused had been sighted at Karandi Trading Centre and together with PC Korir and PC Nganga they headed there with intention of arresting the accused. On arrival however they found that the accused had already been arrested by APC Wanyonyi and APC Onyango of Safana AP Camp. The accused was escorted to his house where the deceased's Identity Card was recovered; he was later taken to Karatina DCIO Office for further investigations.

10. **PW2** also stated that one Njogu informed them that the deceased had fought with the accused. He identified the accused in the dock; under cross-examination he acknowledged that he is not the Investigation Officer.

11. **PW3** is one Sgt Muriuki Kiringo stated that on 31st May 2014 at 7.30 am he received a report from the area MCA Hon. Karere who informed him that a member of the public had reported that a dead body was lying at Karandi Trading Centre. He took a driver and CPL Kiilu and proceeded to the scene where they found a body lying 3 metres from the tarmac road in the direction of Mountain Lodge; he called the OCPD David Kemboi who called the deputy DCIO Karatina, Daniel Nzioka; the Deputy DCIO visited the scene with his team and the Scenes of Crime Unit also went to the scene and photographed, Blood stains were found a few metres from the body. Members of the public questioned stated that the accused was seen quarrelling with the deceased over a mobile phone; a paper bag with jeans trousers and a pair of shoes was found near body which members of the public stated belonged to the deceased; The matter was handed over to the DCIO.

12. The investigations were carried out by Inspector Nzioka. One Njogu pointed out the house of the accused and recorded a statement. Njogu had rented the house to the accused. An identity card belonging to the deceased was found at the accused's one roomed house; the Investigating Officer scooped blood samples from the house. On 30th may 2014 at around 4.45pm the MCA called again and informed the police that the accused had been sighted at Karandi. The accused was charged with murder because he was the last person seen with the deceased. Njogu had informed the police that the deceased and the accused had fought the previous night and that he separated them. The deceased was chased away and the accused followed her.

13. The prosecution made an application under Section 77 of the Evidence Act for Doctor Stephen Wang'ombe Nderitu (**PW4**) to produce the medical report (**PEXh.1**) on behalf of Doctor Kariuki who could not be accessed; which application was allowed; **PW4** stated that he is familiar with the handwriting of Doctor C.M Kariuki, a medical officer who was working at Nyeri Sub-County Hospital, Karatina in 2014 and was later transferred to Kenyatta National Hospital.

14. According to the medical report Dr. Kariuki had performed a post mortem on Lucy Kagenda Giti (deceased) on 16th June 2014 at Karatina Hospital; that the deceased was 26 years old; her face was swollen and there were small bruises on the neck, right knee and left hand. There was a blood clot on the right side of the head; there were brain contusions and the body had sub-dural haematoma extending from front to the back of the head; the doctor formed an opinion that the cause of death was severe head injury resulting from blunt trauma; on cross-examination the doctor stated that the nature of the injuries could not have been caused by bare hands and the age of the injuries could not be established.

15. **PW5**, Julius Muriuki, a clinical officer at Nyeri PGH stated that he specializes in mental and psychiatry and he produced the mental status report (**PEXh.2**) for the accused on behalf of one Dr. Mwenda; the production of the report was not opposed. The report indicated that the accused had no previous psychiatric illnesses and no anomaly was noted at the time of the examination; his orientation was gloomy; his mental status in terms of mannerisms, intelligence, judgment and insight were all normal. The doctor formed the opinion that the accused was of normal mental status at the time of the examination and was fit to plead and stand trial.

16. The prosecution closed its case and after hearing the submissions of defence counsel and prosecuting counsel on the issue as to whether the prosecution had made out a case for the accused to be called upon to defend himself; the court made a determination that the prosecution had made out a prima facie case against the accused that warranted him to be placed on his defence to answer to the charge;

THE DEFENCE CASE

17. **DW1**, the accused elected to give a sworn testimony and called no witnesses; he stated that he was not involved in the death of Lucy Kagendo on the 31st May, 2014; that on that particular day he had a temporary job fencing his house at Sagana and closed his work in the evening and never left his house; that he had not completed the work and needed to put barbed wire the following day so he could not leave his house because he feared that his material would have been stolen.

18. The following day he woke up and with the assistance of a temporary labourer he put up the barbed wire until 1.00pm. He later went to Karandi Trading Centre with his co-worker where he was told that the brother to the area MCA, one Fredrick Nderitu, was looking for him together with some Administration Police (AP). He was arrested by the AP but was not given the reason for the arrest. He was taken to Mutara A.P Post where he was interrogated. The accused did not know the name of the officer who interrogated him. The officer asked the accused if he had been with a lady that week or previous day but did not mention the name of the lady. The accused person responded that he was alone.

19. The police from Kamariga Police Station were called and the accused was taken there. He was asked if he knew Lucy Kagendo; he admitted to knowing her but indicated that he had not seen her since 18th February 2012. The following day he was ferried to where he resided for investigations with the aim of looking for any evidence to link him to the murder of the deceased but none was found; the Investigation Officer interrogated the members of the public who were around and then he was also taken by the police to his rural home which was about a kilometre away; a search was conducted but still nothing was found.

20. He was then taken to Kiamariga and later to Karatina where he was kept in the cells; after two days he was taken to Karatina Court where the Investigating Officer sought for more time to conduct the investigations; his application was allowed and he stayed in the cells for two weeks and was later arraigned in Court to take plea; he concluded by stating that he was not involved in the murder.

21. On cross-examination he admitted to knowing the deceased and added that she was his wife from 2008-2012; after 2012 he heard that she got married elsewhere; they were blessed with a child who lived with the accused's mother; he lived together with the deceased at Timau; in 2013, the deceased took the child to him and left her there; he did not know where she went but he was not happy that he got married elsewhere; but he insisted that he was not with Lucy on the fateful day and that there was no fight between him and her.

ISSUES FOR DETERMINATION

22. At the close of the defence case the accused adopted his submissions made earlier when submitting on a case to answer; and the prosecution adopted the evidence on record; upon taking the prosecution evidence and the submissions made this court framed only one issue for consideration; which is;

(i) Whether the facts and evidence brought forth by the prosecution are sufficient to enable an irresistible inference of guilt as against the accused to be drawn;

ANALYSIS

23. The prosecution in a charge for murder has to prove four key ingredients of the offence; which are fact of death; cause of death; that the accused caused act of death; and had malice aforethought.

24. The difficulty the prosecution had was that there was no eye witness to the murder incident and therefore there was no direct evidence; therefore the prosecutions entire evidence was based on circumstantial evidence as to what actually transpired before and up to the moment of the killing.

25. Circumstantial evidence must be examined in the light of the principles set out very clearly in the case of **Erick Odhiambo Okumu vs Republic [2015]** the Court of Appeal referred to Abang'a alias Onyango vs Republic C.Appel No.32 of 1990; the court had this to say: the threshold which circumstantial evidence must meet to justify a conviction are;

“(i) The circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;

(ii) The circumstances should be of tendency, unerringly pointing towards guilt of the accused;

(iii) 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 no one else.”

26. It must not be forgotten that the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. This is a burden which never shifts to the party accused; Refer to the case of **Republic vs Kipkering Arap Koske & Another [1949] 16EACA 135.**

27. In this instance the prosecutions inference of the accused persons' guilt was based on the following circumstances; firstly, the inference was based on the relationship the accused had with the deceased and that they were living together; **PW2** testified to having been told by one Njogu that the two lived together; and upon visiting the accused's house indeed the deceased's Identity Card was found therein; and some blood stains were also found therein;

28. Secondly upon, the information collected by **PW2** from members of the public who told him that the accused had been seen quarrelling and fighting with the deceased over a mobile phone and that this had occurred the previous night; he further told the court that he had interrogated a person called Njogu who had also corroborated the fight that the deceased and the accused had the previous night and that he, Njogu was the one who had separated them; that the deceased had then been chased away and the accused followed her; the said Njogu was the landlord of the accused and had rented out the one roomed house to him; and was the one who pointed out the house of the accused to the investigating officer; therein the officers found the deceased's Identity Card and scooped samples of blood from the house;

29. Thirdly, the inference of guilt is also based on the site where the deceased's body was found which was within the vicinity of the accused's house; and lastly, the blood stains found at the crime scene;

30. In this instance the mere fact that the deceased had a relationship with the accused indeed makes him a suspect but the surrounding chain of circumstances relied upon by the prosecution is weakened by the lack of evidence on the blood samples; it is apparent that the Investigating Officer never completed his investigations as the blood samples taken as exhibits were never tendered in court as evidence; the presumption would be that the samples may not have been taken to the Government Chemist for analysis; by failing to do so the prosecution lost a chance to prove their case based on circumstantial evidence; in that the blood sample found in the accused's house could have turned out to have been that of the deceased and or the sample taken at the scene of crime could have been that of the accused so as to link the accused person to the murder;

31. Also, even though there is no legal requirement in law on the number of witnesses to prove a fact,

Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:-

“143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”

32. In the case of **Keter V Republic [2007] 1 EA 135** the court held inter alia thus:

“The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”

33. It is this court's considered view that the actual circumstance leading to the death of the Deceased could have come out in evidence had

the prosecution called a crucial independent witness by the name Njogu; this key witness witnessed the deceased and the accused fighting and is said to have separated them; this witness may have provided the link to the accused and to the death of the deceased that would have been sufficient to establish key ingredients of the offence namely '*malice aforethought*' and '*actus reus*';

34. Therefore in light of the above circumstances that led to the fight between the appellant and deceased remain unclear; the motive or reason for the fight remains uncertain; it would be an error of law for this court to invoke circumstantial evidence when malice aforethought for murder has not been established;

35. In the circumstances this court is satisfied that there is no circumstantial evidence that meets the threshold to justify a conviction;

FINDINGS AND DETERMINATION

36. For the reasons stated above this court makes the following findings and determination;

(i) This court finds the circumstantial evidence to be inconclusive.

(ii) The burden of proving the key ingredients of the offence of murder and the actual circumstances that lead to the death of the deceased lies with the prosecution and this court finds that this burden has not been discharged.

(iii) As the burden has not been discharged a conviction cannot stand.

(iv) The accused person is hereby found Not Guilty.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 28th day February, 2019.

HON.A.MSHILA

JUDGE