



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 51 OF 2007

REPUBLIC.....APPLICANT

VERSUS

ALEX MAINA MUGO.....DEFENDANT

JUDGMENT

The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, cap. 63. According to the information, on the night of 3 and 4 September, 2007, at Kiriaini market in Murang'a District of the then Central Province, jointly with others not before court, he murdered Julius Mugo Maina (herein 'the deceased'). The deceased happened to be his father. He pleaded not guilty to the charge.

The background against which the accused was charged can be found in the testimony of the investigations officer, one Alphonse Kituku Mbulo (PW10). He testified that on 4 September, 2007 he was an investigator attached to Criminal Investigations Department at its office in Muranga. On the material date he received a report of a murder at Kiriaini. He proceeded to the scene accompanied by his colleagues and found the deceased's body outside a bar behind the shops at Kiriaini shopping centre. The deceased's house was about 400 metres from where the body was. He examined the body and observed that it had multiple injuries though the post-mortem conducted showed that the deceased died of asphyxia and not necessarily as a result of the injuries.

It was the investigating officer's evidence that on 26 September, 2007 he got information that the deceased was murdered by the accused and it is then that arrested him. Based on the information he received, an identification parade was conducted in which one Ngalyuli Buruti is alleged to have picked the accused out as the person he saw murder the deceased. Buruti was, however, handicapped in a way, in the sense that he either could not communicate or could not do so coherently and for this reason, one Lucy Mugo, who turned out to be a sign language interpreter from Muaranga school for the deaf, was invited at the police station to assist in interpreting the communication between the police and Buruti during the identification parade exercise and the recording of his statement. In a nutshell, it is as a result of Buruti's statement that the accused was charged with the offence of murder.

Chief Inspector Benjamin Kiprono (PW8) who conducted the identification parade corroborated the investigations officer's evidence that Buruti Ngariuri was partially dumb and he had to seek the services of an interpreter to assist in communicating with him during this part of the investigation process. He eventually picked the accused from the parade.

Apart from Buruti, none of the rest of the prosecution witnesses saw, or rather testified that they saw the accused murder the deceased.

The deceased's mother, Teresia Njeri (PW1) testified that she was informed of her son's death by Mugo, her other son. It was her testimony that she saw the accused armed with a blood-stained knife at the scene and that he threatened to kill her as well when she cursed whoever killed her son. The accused told her that she had murdered the deceased. A week earlier the deceased had quarreled with his wife. Although she testified that there was no conflict between the deceased and the accused, she alleged that the deceased had told her that the accused and the deceased's wife had, on previous occasions waylaid him and assaulted him apparently on his way home.

The deceased's brother, David Kariga (PW2) also learnt of the deceased's death on 4 September, 2009; as a matter of fact, he is the one who informed his mother (PW1) and brother, Onesmus Kihome Maina (PW4) of the death as soon as he saw the deceased's lifeless body at the scene where it was found. He had been attracted to the scene by screams of people who had arrived at the scene ahead of him. He reported the murder to the police and together with his brother, Charles Kiai (PW4), they identified the body at the mortuary for post-mortem purposes.

Like his mother, Onesmus Kihome Maina (PW4) testified that the accused was at the scene armed with a knife with which he threatened to harm the deceased's mother.

A scenes of crime officer Albert Kiarie, took photographs of the scene and the deceased's body. Unfortunately, he passed on before he testified; his statement together with the photographs he took were produced by corporal Githinji Marangu (PW9).

As far as the evidence on the cause of the death is concerned, Dr Julius Kimani (PW5) opined that the deceased may have died of lack of oxygen. He observed that the deceased's nostrils were blocked and therefore he possibly died of strangulation. He, however, observed that the body had injuries on the left thigh and that he also bled from the urethra. His throat was also bruised. He did not observe any knife inflicted injuries though.

The accused gave a sworn testimony in his defence and denied having murdered his father. Like some of the prosecution witnesses, he testified that he stumbled on the deceased's body on the morning of 4 September, 2007 as he went to deliver milk. He was arrested together with his mother and sister when they went to record their statements at the police station. His mother Helen Wahu Mugo (DW2) and sister Terry Njeri Mugo (DW3) testified in his defence and stated that the deceased left on the evening of 3 September, 2007 and never returned. Helen in particular, did not find this unusual because it was her husband's habit to come back home late or not all. It was their evidence that they all came to know of his death 4 September, 2007.

The evidence of the deceased's death and the cause of his death was not controverted and therefore I am satisfied that the prosecution established at least two of the crucial elements that constitute the of offence of murder as defined under section 203 of the Penal Code; this section reads as follows:

203. Murder

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

To establish a case of murder, therefore, the prosecution must prove death of a person; it must also prove that the death was as a result of an act or omission of another person; that the act or omission was unlawful; and that the person who did the unlawful act or omitted to act had malice aforethought.

The pathologist's opinion was that the deceased was strangled to death. His certified his death after the deceased's body was positively identified by his kin. It is apparent from the evidence therefore that the deceased not only died but also that his life was terminated by an unlawful act of another person.

As to who perpetrated this crime, it was the investigation officer's evidence that he narrowed on the accused because of what he had been informed by one Ngalyuli Buruti who is alleged to have witnessed the murder. As a result of Buruti's statement, an identification parade was conducted out of which Buruti picked out the accused. As a matter of fact, the accused was charged because he had been positively identified as the person who murdered the deceased.

Despite his central role in the prosecution of the accused and, crucial as his evidence would have been, Buruti never testified. The record shows that he appeared in court on 1 February 2016 but he could not communicate without the help of an interpreter and for this reason, Ms Chebet, the learned counsel for the state, sought for adjournment to enable her get an interpreter. On 16 May 2017 Mr Muranga, who appeared for the state on this particular occasion, sought for an adjournment and this time round he specifically applied for a witness summons to issue to one Lucy Mbugua, an interpreter from Muranga school for the deaf to appear in court for interpretation of Buruti's testimony. However, when the matter came up for hearing again, Buruti did not appear and the state closed its case without his evidence.

It was not clear to me why the state took the drastic step of closing its case without the evidence of Buruti considering that he was such a key witness. Whatever the reason may have been, all I can say is that if the prosecution case against the accused was based on an eye witness' account, it certainly cannot stand if the witness who is alleged to have witnessed the murder incident could not testify, for one reason or the other. The reasons why the prosecution case would fail in these circumstances are fairly obvious and simple. In the first place, without the testimony of the purported eye witness, there is no evidence that anybody witnessed the murder of the deceased; secondly, if such witness existed, failure to call him would imply that had he been called, his testimony would have been adverse to the prosecution case; thirdly, again if ever there was such a witness his account of what he allegedly saw was not put to scrutiny and tested by way of examination and cross-examination to determine its strength and, at any rate, whether it met the threshold of proof beyond all reasonable doubt. The court would have been interested to know, for example, the circumstances under which the accused is alleged to have been identified; were they, for instance, favourable for a positive identification or was there a possibility of mistaken identity?

I am minded that evidence does not always have to be direct to sustain a conviction for it is settled that a trial court may, in certain circumstances, safely convict on indirect or circumstantial evidence. But such evidence must be narrowly construed before drawing any inference of guilt on the part of the accused. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person. (See **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**).

It has been held in these decisions that the court can only convict on circumstantial evidence if the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Where there are co-existing circumstances that would weaken or destroy an inference of guilt, it would not be safe to convict on such evidence.

The prosecution, as noted, based their case on what would have been direct evidence had their acclaimed eye witness testified; as much as it never suggested that the accused was charged based on circumstantial evidence, it still behoves this court to consider the evidence on record in its entirety rather than in isolation before reaching any conclusions. However, even if I was to consider the available circumstantial evidence, I am still not be persuaded that it is capable of standing to such a threshold as would be necessary for an inference of guilt to be drawn. Of course, there was evidence that there could have been disagreements and even physical confrontations amongst members in the deceased's family and, here, I agree that such hostilities may probably have contributed to the deceased's premature demise; however, without any corroborative evidence that this was the case, it would be unsafe to convict based on this evidence alone. Needless to say, that in

criminal law an accused can only be convicted upon proof of an offence of which he is charged beyond all reasonable doubt and not on mere factual preponderances.

And even in examination of circumstantial evidence, one cannot overlook the fact where there are co-existing circumstances that would either weaken or destroy an inference of guilt, such evidence would be disregarded. In my humble view, the fact that there was an eye witness who was not called to testify is sufficient enough to dent the prosecution's case in this respect.

In conclusion therefore, I hold that the prosecution has not proved its case against the accused beyond all reasonable doubt. Accordingly, I hereby acquit the accused of the charge of murder and he is thus set at liberty unless he is lawfully held.

Dated, signed and delivered in open court this 26th day of April, 2019

Ngaah Jairus

JUDGE