



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 13 OF 2016

[FORMERLY NYERI HIGH COURT CRIMINAL CASE NO. 4 OF 2010]

REPUBLIC.....PROSECUTOR

VERSUS

BENARD MBUTHIA KANGETHE.....1ST ACCUSED

JOSEPH NGIGE KANGETHE.....2ND ACCUSED

RULING

1. Johana Kangethe Karanja (hereafter *the deceased*) was last seen alive on New Year's Day 2010. His body was discovered ten days later in a coffee plantation.
2. The body had decomposed; and, some bones were missing. Some witnesses said parts of the body were devoured by dogs or wild animals. The post mortem report stated: "*tissues around the skull were missing; maggots noted*".
3. The two accused are *sons* of the deceased. They were suspected of having a hand in the murder of their father over a land or domestic dispute.
4. The Republic brought *information* to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the **Penal Code**.
5. The particulars were that on 1st January 2010 at Ngararia Location, Kandara District, Murang'a County, they jointly murdered the deceased.
6. They pleaded *not guilty*. The prosecution lined up *nine* witnesses.
7. I am now called upon to determine whether there is *sufficient* evidence to place the accused on their *defence*.
8. The first witness was Joel Wanderi. The deceased was his uncle. On 1st January 2010, he was invited to Kandara by the deceased. The deceased had organized a traditional goat-eating ceremony to reconcile him (deceased) and one of his two wives, Salome Kang'ethe (the mother of both accused).
9. PW1 said that he advised the elders not to slaughter the goats until the deceased and Salome reconciled. They did not heed his advice. PW1 declined to partake of the meat because Salome and the deceased were not staying together. He said that the deceased was living with another family in Nairobi.
10. PW1 said he saw the two accused that day. They were quarreling but the tiff did not involve the deceased. PW1 left for his home in Narok. On 4th January 2010, Salome, called him and informed him that the deceased was missing since 1st January 2010. PW1 was later to learn that the deceased was murdered.
11. PW2 was Jane Wambui. She is married to a brother of the deceased. On 30th December Salome told her to tell PW2's husband (Joel Ngige), to avoid meeting with the deceased. She said that Salome warned her "*that if [her] husband does not avoid the [deceased], he will be buried in the same grave*".
12. PW2 said that the deceased and her husband came to her house on 30th December 2009. She informed them of the threat by Salome.

Ngige reported the matter to a village elder. Ngige left home and did not return until three days later. She said that Ngige did not attend the goat-eating ceremony at the home of the deceased. She said that Salome and the 1st accused were arrested on suspicion that they killed the deceased.

13. PW3 was Jane Mwihaki, a sister to the deceased. She said that on 30th December 2009 the deceased told her that he had brought two goats into the house of the 1st accused. The 1st accused and Salome objected. She said that the original house put up by the deceased had been demolished; and, that Salome had put up a new house.

14. PW3 in cross examination stated as follows-

“It is true that he had abandoned his wife Salome and children at Thika. He had 4 children at Kandara (including the 2 accused).

The accused persons never even went to school because of the abandonment by the deceased. Even the house that they lived in was built by his wife Salome with great difficulty”

15. PW4 was George Njuguna. On 10th January 2010, his wife alerted him that a body had been discovered in a coffee farm owned by Benson Mbugua. PW4 and his friend Samuel went there. The body was badly decomposed. Samuel reported the matter to a village elder who in turn called the police. He said that nearly all the family members of the deceased were arrested by the police.

16. PW5 was Lucy Wambui. She said that on 1st January 2010, she met Salome at the shopping centre. It was raining heavily and she accommodated Salome for the night. They later met at a community policing session on 14th January 2010. She later heard of the discovery of the body of the deceased and that Salome was arrested.

17. PW6 is a step-brother of the deceased. The relevant part of his evidence was that he did not see the deceased between 2nd and 12th January 2010. He was at first not worried as the deceased used to work at Ndakaini Dam. But on 13th January 2010 he reported the matter at Kandara Police Station. PW6 also attended the postmortem examination. He saw five bones and a jacket belonging to the deceased.

18. PW7 was Joseph Kariuki. He confirmed that on 1st January 2010, he met the deceased at the *Kiama* ceremony at the deceased's house. He had been tasked to get some elders to deal with the domestic matter. At 7:00 p.m., they met with the deceased at King Silver Bar. They agreed to have a formal reconciliation ceremony on 10th January 2010.

19. PW7 said that on 10th January 2010, a young boy informed him of the discovery of the body in the coffee farm. He and Ezekiel Njoroge reported about the disappearance of the deceased to the police on 13th January 2010.

20. PW8, Gabriel Njoroge, also met the deceased on 1st January 2010 at the *kiama* ceremony. He left at 4:30 p.m. He met the deceased later that evening at King Silver Bar. The deceased left the bar with Ezekiel Njoroge. On 10th January 2010, he saw the decomposed body in the coffee farm.

21. PW9 was Police Constable Kipkosgei. He is the current Investigating Officer. He said that the police collected the remains of the deceased and took them to Thika Level 5 Hospital. A post mortem examination was conducted by Dr. Murage on 22nd January 2010. PW9 produced the post mortem form under section 77 of the **Evidence Act**. The defence had no objection.

22. PW9 stated further that-

“There was an underlying land issue. The two suspects (now accused) were heard by the public saying the ceremony for 1/1/2010 would not go on. They were suspected of killing the deceased who was their father.”

23. Learned counsel for the Republic and the defence did *not make any submissions*.

24. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*.

25. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*. Malice aforethought is the *mens rea* or the *intention* to kill another person.

26. There is absolutely *no* doubt about the *death* of the deceased. PW4, PW6, PW7 and PW8 all saw the remains. According to the *pathologist*, the body had decayed tissues; bones and the tissues around the skull were missing. The cause of death was *“head injury with depressed skull fracture right temporal region”*

27. I entertain *no* doubt that the cause of death was *unlawful*. The only live question now is whether the accused, of *malice aforethought*, killed the deceased.

28. There was no *eye witness* to the murder. The entire case for the prosecution is built upon *circumstantial evidence*.

29. I am well guided by **R v Kipkering arap Koske & another** 16 EACA 135 (1949) where the court held-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

30. The deceased was last seen at the shopping centre on the evening of 1st January 2010. He was in the company of PW7 and PW8 at the King Silver Bar. The deceased left with Ezekiel Njoroge. When cross examined, PW7 said the deceased called him later to know whether he had arrived home. PW7 did not know where the deceased was calling from.

31. That was the last time the deceased was seen or heard of alive. His badly decomposed body was to be discovered ten days later in the coffee farm.

32. There are three relevant pieces of evidence. The first came from PW2 who said that the mother of the accused, Salome, issued a warning *“that if [PW2’s] husband does not avoid the [deceased], he will be buried in the same grave”*.

33. The second piece of incriminating evidence was from the investigating officer who said that the accused *“were heard by the public saying the ceremony for 1st January 2010 would not go on. They were suspected of killing the deceased who was their father.”*

34. The third thread of evidence was from PW3. She said that on 30th December 2009 the *deceased* told her that he had brought two goats into the house of the 1st accused. The 1st accused and Salome objected. She said that the original house put up by the deceased had been demolished; and, that Salome had put up a new house.

35. There is no doubt that the deceased and Salome were living apart. The deceased was cohabiting with another wife in Nairobi. The *Kiama* ceremony of 1st January 2010 was meant to reconcile them. There was to be a follow-up meeting with elders on 10th January 2010. From the evidence of PW2, PW3 and PW9, the accused opposed the ceremony. There was bitterness because of being abandoned by their father.

36. It is also clear that the police were acting purely on *suspicious*s. PW4 said that *Salome* and nearly *all* family members were arrested. There is the obvious domestic dispute and land issue which points to a motive. These are strong *suspicious*s. But they remain just that.

37. There is *no* direct or compelling circumstantial evidence *linking* the accused to the *murder*. I would then *not* say that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the accused *killed* the deceased with *malice aforethought*.

38. In a synopsis there is no evidence to *convict if the accused opt to keep mum*. I am unable to say that a *prima facie* case is established.

39. The law on that subject was succinctly captured in **Bhatt v Republic** [1957] E.A. 332 at 334-

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one-

‘which on full consideration might possibly be thought sufficient to sustain a conviction.’

“This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is-

‘some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence.’

“A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON, J., said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a ‘prima facie case’, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

40. On the totality of the evidence; and, from my analysis of the legal authorities, I am not persuaded that the Republic has proven a *prima facie* case against the accused *sufficient* to place them on their *defence*.

41. Accordingly, under the provisions of section 306 (1) of the **Criminal Procedure Code**, I enter a finding of *not guilty*.

42. The two accused persons are hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 24th day of June 2019.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

1st and 2nd accused.

Ms. R. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.