



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 22 OF 2016

REPUBLIC.....PROSECUTION

VERSUS

SAMSON MITHIKA ALIAS KABOY.....1ST ACCUSED

DORINE MUKIRI ANAMPIU.....2ND ACCUSED

PENINAH KAIGONGI ANAMPIU.....3RD ACCUSED

SILAS GIKUNDI ALIAS MWALIMU.....4TH ACCUSED

JUDGEMENT

1. The accused persons namely **Samson Mithika Alias Kaboy, Dorine Mukiri Anampiu, Peninah Kaigongo Anampiu** and **Silas Gikundi Alias Mwalimu** were charged with murder contrary to section 203 as read with 204 of the Penal Code, Cap 63 Laws of Kenya. Particulars of the offence were that on 24th April 2016 at Muiganda Village, Anjuki Location, Mikinduri Division in Tigania East Sub-County within Meru County jointly murdered **Francis Gitonga Githiora**.

2. In support of the charge against the accused the state summoned 9 witnesses to prove their case.

3. The evidence of **PW1 No. 76706 P.C CHARLES NDEGWA KIAMA** was that on 24th April 2016 he was on duty at about 6.00 PM he was with his colleague Kirinyini. At about 8:00 pm Mr Jacob Mutiga Chief Anjuki Location came to the station. After about 15 minutes the 1st accused person arrived and reported that while he was guarding stones he saw someone steal a stone. He chased the person who then dropped it. However in the course of chasing the thief he lost his mobile phone. PW1 requested that he should borrow another phone and flash his to see where it was ringing at the scene. He was however hesitant and said that his phone might have been taken and misused by another person. He booked his report and the 1st accused person moved and sat on the next bench and talked to Chief Jacob.

4. Soon after a vehicle came with the 2nd and 3rd accused who reported that Francis Gitonga had been stabbed on the back by unknown persons and he was unable to walk or talk. PW1 and his colleague Jacob Mutiga went to the car to see Gitonga. They found him seated in the matatu gazing up. The t-shirt he was wearing was covered with blood stains in the back. PW1 booked the report and gave them an OB number so he could be taken to hospital.

5. **PW2 MICHUKI JACOB MUTIGA** chief of Anjuki area testified that on 24th April 2016 at around 8:00 pm he went to Mikinduri police station to park his motor bike. After parking he entered the report office where he met 3 police officers, PC Ndegwa (PW1), PC Ausei and PC Elizabeth. He started chatting with them. After a short while the 1st accused person came to the report office. He heard him report that he had laid ambushed at a construction site because he suspected materials were being stolen and that a thief came and stole one stone and when he was chasing the thief away he lost his phone and he had come to report the said loss. He was advised by PW1 to go and use another phone to search for his phone at the scene of the incident but he sat on a bench within the report office.

6. After about three minutes a matatu came to the station being driven by Kiremi Mbiti (PW5). The 2nd and 3rd accused also alighted from the vehicle. The 3rd accused reported that her husband had been stabbed by an unknown person. PC Ndegwa asked where the husband was and said that he could not walk and was in the vehicle. He accompanied the 2 officers to the car and found Gitonga. When PC Ndegwa tried to move Gitonga, he did not respond and they suspected that he had passed on. All that time the 1st accused person remained seated on the bench in the report office and did not say anything. When the vehicle left the 1st accused person then left the station.

7. **PW3 ROSE KINJA GITONGA** told the court that on 24th April 2016 she recalls that 7:30 PM she spoke to her husband Francis Gitonga to find out where he was. He told her that he was far but would come home. He said that he had no problem and that he would be late. At

8:00 pm she received a phone call Silas Tuluba who told her to look for means and go to Meru as her husband had been killed by the 1st accused person. Her two children and two neighbors accompanied her to Meru General Hospital. Because of shock she fainted and she was taken for treatment for hypertension. On Monday 25th April 2016 she learnt that her husband had died. The police called her to go to Mikinduri Police Station and record a statement.

8. **PW4 MARY KATHURE** testified and told the court that on 25th April 2016 she left her house to go to her sister's home to feed her goats. After feeding the goats she passed through Mwangangi's home to her construction site. She was constructing a house in Muganda area near SDA School. She found mama Mwanjao seated and she greeted her. When she asked her how she is doing she asked if she had heard about what happened to them. She told her that the 1st accused person had stabbed someone. She told her that the young man came in the evening and found Kaigongi was not in. Francis Gitongawent to Mwanjais place and reported he had been stabbed.

9. This witness is simply telling the court what she was told by mwanjai a witness

10. **PW5 PETER KIREMI** who is a driver told the court that he drives a Mazda Matatu Registration number KCA 089N. He operates along Mikinduri- Meru route. On 24th April 2016 Ms. Kangongi made phone call and informed me the deceased had been stabbed and he should go and take him to hospital. He met Kangongi on the road and she led him to the home of Kangongi where he found the deceased who was unable to talk. Another man helped him to put the deceased in the vehicle. He did not know that Kangongi and her sister accompanied them to the police station where they made a report. They were given an OB number and they went to Meru Level 5 General Hospital where he was pronounced dead. They reported the death at Meru Police Station before they took the body to Meru General Hospital Mortuary. From the mortuary they went back home

11. **PW6 DR. CHARLES NJERU** presented the post mortem report of Francis Gitonga done by Dr. Bett on 28th April 2016. According to the Post Mortem Report the cause of death was excessive hemorrhage due to a stab wound to the spleen.

12. **PW 7 CPL NICK ODHIAMBO** testified and told the court that he is attached to DCI Tigania East Sub County. He took over from CPL Hussein. The initial IO was chief inspector Murgor who was in charge of flying squad at mikinduri. **PW7** was able to go through the file and established that on 24th April 2016 at about 7:30 pm the deceased Francis Gitonga arrived at the home of the 3rd accused person and sat on a bench near the house. The deceased appeared drunk. The 2nd accused person was the one who was at the home by then. She heard the deceased say that he had been stabbed with a knife. When the 2nd accused person examined him she found he was bleeding from the back. The 3rd accused person arrived home later on and they proceeded to Mikinduri Police Station and then to hospital where he was pronounced dead on arrival. The next day on 25th April 2016 OCS Mukinduri together with CP Murgor met the family of the deceased at the station where report of the death was made. Investigations were commenced and the 1st accused person was mentioned severally as the culprit. It was alleged that the deceased and the 1st accused person had a relationship with the 3rd accused person.

13. Police officers visited the scene of the offence where they met the 1st accused person and the 4th accused person while on a motorbike. When the 2 suspects saw the police they started fleeing. The police officers pursued and arrested them. At the 1st accused person's house they discovered a knife that had blood stains and one white t shirt and jacket both of which he suspected the 1st accused person had worn on the day the accused person was stabbed. The knife white t-shirt and jacket were sent to the government chemist for analysis as per exhibit memo form dated 25th April 2016.

14. **PW7** produced the statement of the Chief inspector Nicholas Murgor and also the statement of PC Isaac Ongondo the co-investigating officer

15. **PW8 LAWRENCE KINYUA MUTHOMI** who works at a government Chemist Laboratory as a government analyst told the court that, on 28th May 2016 he received items from PC Nyamweya and CPL Matheka. The items were a knife, t-shirt, jacket. Additionally there was a blood sample of the deceased person. It was requested that they examine the items and determine the presence and source of any blood stains. On examination the knife, shirt, jacket T-shirt and the jacket item were all lightly stained with blood.

16. **PW8** did DNA profiling on the blood stains on the exhibits and the reference blood sample item F of the deceased. The conclusion was the DNA profile generated from the blood stains on the knife item A and the T-Shirt item D both matched the DNA profile generated from the blood sample item F indicated as of the deceased Francis Gitonga. Secondly the blood stains on the shirt item B, the Jacket C and Jacket Item E did not generate DNA profile. PW8 compiled a report dated 27th June 2018 which he produced.

17. **PW9 CHIEF INSECTOR NICHOLAS MURGOR** testified that on 25th April 2016 he was at Mikinduri police station when Chief inspector Mayo summoned him and informed him that there had been a murder. They proceeded to the scene and found a lady by the 2nd accused person who told them what had happened. She said that she was at home when she heard a motorbike entered the home and when she got out of the house the motorbike speeded off. Suddenly Francis Gitonga emerged at the door complaining he had been stabbed. At the material time the 2nd accused person called her sister the 3rd accused who went to the scene and conducted first aid on the deceased before going to Mikinduri police station to report the matter. The report was booked and the 3rd accused was referred to the hospital where the deceased was pronounced dead on arrival.

18. When they went to the scene of the crime they found the 1st accused person and the 4th accused person on a Motor bike registration number KMC 899B. The two suspects attempted to escape but were later caught and arrested. Before taking them to the station they went to the 1st accused person house and conducted a search. At the house they recovered a knife which had blood stains, blood stained t shirt, a brown leather jacket, a checked shirt with a tear on the back, a maroon and cream jacket.

Defence Case.

19. **A1 SAMSON MITHIKA** told the court that on 25th April 2016 he was at home when he left to go visit the 4th accused person at his place of business where he sells charcoal. The 4th accused asked for grass for his cows and he told him they should go to his farm and they used his motorbike. When they got there and before they could open the gate the saw flying squad behind them. They stopped them and asked what they were doing and he told them he was sent to his farm. The officers left and after 30 minutes they came back and arrested them. The police officers instructed him to take them to his house. When they got there he was told to stay in car. They entered the house and later he was told to give the clothes that he had worn the day before. He gave them one t-shirt, one maroon jacket and one knife. The clothes that he gave the police officers had no blood stains. They were taken to the station and together with the 4th accused they were put in a cell.

20. **A1** claimed that on 24th April 2016 he was at his home he went to work and returned home at about 7:00 pm. He parked his motorbike and then went to Mary Kathure's farm. She had given him work guarding materials on the site. When he arrived near the site he saw someone carrying one block of stone. The person saw him and threw the block and escaped. He decided to go report the theft of the blocks. The police officer at the station told him he would not book the report. He additionally reported the loss of his phone and he was advised to go look for it. While at the station he saw a vehicle where the 2nd and 3rd accused came to report a matter but he did not bother about what they were reporting. Accused 1 confirms that he bought a plot from the mother of the 2nd and 3rd Accused and that his plot borders the plot of Mary Kathure (PW4) on one side and that of A2 and A3 on the other. He also confirms that the deceased was also his neighbor and that they had not differed.

21. **A2 DORINE MUKIRI** testified and told the court that on 24th April 2016 she recalls that together with the 3rd accused person they went to church and at 2:30 they went back home. The 3rd accused person however left at 3:30pm. She stayed and slept as she did not have anything to do. At around 7:00 pm she heard the sound of a motorbike and before she got to the door she heard it drive away. When she got out she saw the deceased 5 meters away. She went to her sister's house to get a lamp. The deceased however rushed to their mother's house. She found him talking to her mother, telling her that he had been stabbed but did not know the person who did it. She called her sister and she came and took the deceased to the police station and booked a report then rushed him to hospital.

22. **A3 PENINA KANGONGI** reiterated what her sister A2 said in her testimony. During cross examination she confessed that the deceased was her husband and that the 1st accused was initially her boyfriend between the year 2007 and 2009.

23. **A4 SILAS GIKUNDI** told the court that on 24th April 2016 he was at his place of work and at 7:00 m he closed his work and went to watch the news. While watching the news the 1st accused person came and told him that he had come from the police station to report that he had lost his phone. He wanted him to use his phone to call but he did not have credit. Samson then gave him 20 shillings and they got credit. They found that Catherine had used her phone to call the 1st accused persons phone and they found that the phone was at the 1st accused house. The 1st accused then left them at the bar and went home. A4 left the bar at 10:00 pm to go home. On 25th April 2016 on Monday he went to fetch grass for his cows from the 1st accused farm who accompanied him to the farm as he carried him in his motor bike. When they got there they met flying squad and were later on arrested.

24. **DW5 CATHERINE GAITE** told the court that she was at her place of work when at about 7:35 pm when the 1st accused came and found her with the 4th accused. She heard 1st accused tell 4th accused to call his phone as it was misplaced but the 4th accused did not have credit. She volunteered to call his phone and it was his daughter who picked it.

25. **DW6 MARY KAWIRA** told the court that on 24th April 2016 she went to church where she met the 3rd accused. There was a fund raiser she attended with her. After the fundraiser the 3rd accused accompanied her to her home. There she received a phone call that caused her to hurry home.

26. **DW7 GRACE MWANJAI** told the court that on 24th April 2016 she was with the 2nd accused when she heard the sound of a motorbike. Subsequently the deceased entered her house and told her that he had been stabbed. He told her that he did not know who had stabbed him. The second accused called the 3rd accused who came with a vehicle and took the deceased to hospital.

27. In consideration of the evidence on record for the prosecution and the defence and in consideration of the submissions by the defence counsel, this court is to determine whether the ingredients of the offence of murder as defined under section 203 of the penal code have been proved beyond reasonable doubt by the prosecution.

28. The ingredients /elements to be proved by the prosecution as spelt out in the case of **Anthony Ndegwa Ngari vs Republic [2014] eKLR** are as follows:-

- a) The death of the deceased occurred
- b) That the accused committed the unlawful act which caused the death of the deceased; and
- c) That the accused had malice aforethought.

29. I should now determine whether the prosecution has proved their case beyond any reasonable doubt. To secure a conviction for murder, the prosecution must prove beyond any reasonable doubt the following;

a. The death of the deceased and the cause of death;

b. That the accused caused the unlawful act or omission which caused the death; and

c. That the accused had malice aforethought as defined under section 206 of the Penal Code as follows:-

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

a. An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

b. Knowledge that the act or omission causing death will probably cause the death 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 it may not be caused;

c. An intent to commit a felony

d. An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

30. On the burden of proof of beyond reasonable doubt required of the prosecution, Lord Denning in the celebrated case of **Miller v Minister of Pensions [1947] 2 ALL ER 372** stated inter alia as follows:

“Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the court of justice.”

31. In regard to a fact of death Dr. Bett conducted post mortem on the body of the deceased and prepared a report dated 28th April 2016 indicating that the deceased death was caused by excessive hemorrhage due to a stab wound to the spleen. All the other witnesses for the prosecution and defence confirm the fact of death. The deceased was stabbed from the back and the clothes he was wearing according to PW9 Chief Inspector Murgor that is a checked shirt exhibit P6 and maroon and cream jacket exhibit 7 had a tear mark at the back indicating the area that the stab was inflicted. The deceased who was said to have been in a relationship with the accused no. 3 entered into DW7's house and told her that he had been stabbed. The stab wound was not inflicted accidentally because the person who committed the act escaped subsequent to stabbing the deceased. That action was unlawful and the perpetrator cannot be said to have had good faith in stabbing the deceased person. The use of a sharp object aimed at perforating the spleen a very delicate organ in the body must have been actuated with malice aforethought.

32. A2 Doreen Mukiri Anampiu and her mother DW7 Grace Mwanjai were at home in the evening of 24th April 2016 when they heard the sound of a motor bike and immediately thereafter the deceased ran into DW7's house and said that he had been stabbed. They again had the motor bike speed off from their home. Evidence from both the prosecution and the defence confirm that the A3 was not at home when the deceased rushed into DW7's house and said he had been stabbed. The connection that A2 and A3 have is that A3 according to investigations and according to DW7 was in relationship previously with A1 and at the time of the offence with the Deceased person. DW7 said that she had sold land to A1 and she told him that in that case her customs (Kimeru) could not allow her daughter to get married to a person that she had sold land. A3 confirmed in cross examination that the deceased was her husband and when she reported the offence she said that her husband had been stabbed by unknown person.

33. In their testimonies none of the witnesses testified to have seen any of the accused persons stabbing the deceased. However, at almost the same time that the deceased had been stabbed A1 confirms that he had been at PW4's land or plot where he alleges that he had seen a thief stealing building stones. He confirms that he went to the Police station to report about the thief as well as loss of his phone. PW1 and PW2 said while A1 was at the police station A2 and A3 went to report that the deceased had been stabbed. That when they went to motor vehicle to check on the deceased who could not talk or walk the accused person remained at the report office seated on a bench. A1 said that he did not bother to know what report A2 and A3 had come to make at the police station and yet he bought land from their mother and he was their immediate neighbor. Furthermore, he had been in a relationship with A3. This court finds that although no one saw him commit the offence his conduct of rushing to the police station was pre-emptive of the possible action by the police and was meant to remove him from the scene of crime. PW4 does not tell the court that A1 reported that there was a thief that he found stealing stones at her construction site. In fact she said she only told the A1 to keep an eye on her plot in case of intruder but she did not employ him. The circumstances surrounding the commission of the offence and the conduct of A1 make this court to infer that A1 innocence is highly doubtful. In **SAWE –V- REP [2003] KLR 364** the Court of Appeal held.

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

4....

5. ...

6. ..

7. Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

34. Secondly, the Investigating Officer Chief Inspector Murgor (PW9) recovered exhibits from A1's house i.e Blood stained knife with a black and silver handle exhibit 3 and a white T-shirt exhibit 4 and a leather Jacket exhibit 5 which together with a checked shirt, maroon and cream jacket belonging to the deceased and blood sample from the deceased were forwarded to the Government chemist for analysis and lifting DNA profile.

35. PW8 Lawrence Kinyua Muthuri Government Analyst examined the items and concluded that the DNA profile generated from the blood stains on the knife and T-shirt items A and B and which were produced as exhibits P3 and P4 matched the DNA profile generated from the blood sample item F indicated as of the deceased Francis Gitonga. These results coupled with the conduct of A1 and the evidence of the prosecution witnesses as well as DW7 make this court find that A1 was the perpetrator of the murder of the deceased Francis Gitonga.

36. The A1 person in his defence did not controvert the fact that on his arrest by PW9 and other officers a search was conducted at his house and the exhibits produced herein recovered including a knife and white T-shirt which had blood stains and analysis of the blood stains on those exhibits were compared with the blood sample of the deceased and it was established that the blood was from a human being and that human blood matched the profile in the blood sample taken from the deceased. A1 does not explain how his exhibits MFI D1 and exhibit D2 are related or would exonerate him from this offence. He claims that the flying squad officers from Mikinduri Police station have had issues with him and that one time he and A4 were charged with the offence of robbery with violence. He has however, not produced the proceedings or particulars of the charge he has referred to. Authenticity of MF1 D1 and exhibit D2 were challenged by the prosecution during cross examination of A1.

37. A2 and DW7 heard the sound of a motor bike near their home and after the deceased had rushed into DW7's house and said he was stabbed they again heard motor bike speed off. Immediately thereafter, PW1 & 2 said the accused went to Mikinduri Police station using his motorbike and in less than 5 minutes according to PW2 A2 and A3 arrived at the station to report that the deceased had been stabbed. The suspicion that the person who stabbed the deceased used a motorbike is valid.

38. On motive the 3rd accused person in her testimony confessed to the fact that the 1st accused was her former boyfriend and that the deceased was her husband. The 1st accused accosted the deceased when he was on his way to visit the 3rd accused person therefore proving his motive to kill the deceased. Having met all the ingredients of murder I find that the 1st accused is guilty.

39. The 2nd and 3rd accused persons in their testimonies alluded to the fact that when they met with the deceased he had already been stabbed and all they did was try to find him help. I find that their story holds water and that they had no ill will against the deceased. Consequently, I find them not Guilty and are acquitted.

40. As for the 4th accused person the evidence that was produced by the prosecution did not link him to the death of the deceased. The A4 was arrested because he was found with A1 near the scene of crime. None of the prosecution witnesses gave any evidence that could link him to the offence he is therefore found not guilty and is accordingly acquitted. A1 is convicted as charged.

HON. A. ONG'INJO J

JUDGE

JUDGMENT DELIVERED, DATED, AND SIGNED IN COURT ON 25TH JULY 2019

HON A.ONGINJO

JUDGE

In the presence of:

C/A:

Ms Mbithe for the State:-

Mr Ashaba Advocate for the Accused: - Mr Mureithi holding brief

A1:- Present in person

A2:- Present in person

A3: Present in person

A4: Present in person

HON A.ONGINJO

JUDGE

Ms Mbithe

I pray for date to confirm records.

Order: Mention 31.7.2019 for Records. Accused remanded in custody.

HON A.ONGINJO

JUDGE