



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL CASE NO 58 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**MOSES NDAU KIMANI.....ACCUSED**

**JUDGMENT**

1. **Moses Ndaui Kimani**, the Accused herein is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars in the information state that on 20<sup>th</sup> September 2014 at Githunguchu Location, Gatundu South sub-county, he murdered **Doris Muthoni Maina**. He denied the charge and was represented by Mr. Njuguna.

2. Through seven witnesses, the prosecution presented the following case. **Doris Muthoni Maina**, the Deceased herein was aged about 19 years in 2014. She had recently completed her high school education and had joined university. She resided at Githunguchu village, Gatundu South Sub-country with her parents including her mother **Lucy Waruiru Babai (PW4)**. Early on the morning of 20/9/14 **PW4** left for work. The Deceased remained alone at home performing chores.

3. Neighbours, including **Boniface Kamau Kimani PW1**, his father **Patrick Kiarie (PW2)** and a local worker **Patrick Mburu Muthoni (PW6)** were all attending to their own business when they heard screams of a woman seeking help. As **PW6**, ran out in response to the alarm, he met with the Accused, close to the gate of the compound of the deceased. To the inquiries by **PW6** the Accused pointed to a different compound than the deceased's indicating that to be the source of screaming. The Accused then went away. Just then, **PW1** and **PW2** arrived at the homestead of the deceased. Meanwhile, **PW6** finding no one in the compound he had been pointed to returned towards the deceased's compound. He met with the witnesses **PW1** and **PW2** who had already entered and found that the deceased had been stabbed in the abdomen, by a man who had escaped, apparently using a kitchen knife which lay near the utensils which she had apparently been washing up.

4. At that moment, **PW6** informed **PW2** that he had moments earlier spotted the Accused at the gate of the deceased. With other members of public, **PW2** and **PW6** immediately set out in pursuit of the Accused who had already left the scene. Upon sighting him ahead of them running, the men gave chase. The Accused continued running away and after about 2 km of chase he was caught and subdued in a field. Police luckily came to the scene as a mob attempted to lynch him. He was arrested by **PC Japheth Kiptala (PW3)** and others. The suspected murder weapon was retrieved from the scene of offence.

5. Meanwhile, the deceased had been escorted by **PW2** and others to hospital. The deceased however succumbed to her injuries later on the same date. A post mortem examination conducted by **Dr. Johansen Oduor** on 23<sup>rd</sup> September 2014 revealed that death was caused by severe bleeding due to penetrating stab in the abdomen. After the Accused had been assessed for mental fitness, he was charged.

6. The Accused gave a sworn defence statement but did not call any witness. To the effect that, on the morning of 20<sup>th</sup> September, 2014, he was headed to work. He heard screams and stopped. Noting no movement, he therefore resumed his journey, in the course of which he met with **PW6**. He inquired with him about the screams and asked the Accused to accompany him to the source. The Accused declined explaining that he was headed to work while the screams were coming in the direction he had just come, behind him. He excused himself after some discussion with **PW6** and as he proceeded on met other people who questioned him about the screams. He did not stop, advising the inquirers to go find out.

7. Soon, he was confronted by a man wielding a stick running towards him with others behind him also approaching. He changed course, running towards a nearby field with the men in hot pursuit. They eventually caught up with him and assaulted him as they accused him of stabbing someone. He denied this saying he did not know the deceased. He also denied that he had been spotted near the scene of murder earlier that morning.

8. The defence submitted that the prosecution case rested on circumstantial evidence. Citing the case of **Abanga alias Onyango V R Cr. Appeal No. 32 of 1990 (VR)** as quoted in **R V Kelvin Mutwiri Murongi [2016] e KLR** the defence reiterated the applicable principles. Based on the said principles, the defence argued that the prosecution evidence did not satisfy the test as there was every possibility that a

different person may have committed the offence, including **PW1** and **PW6**.

9. For his part, the DPP submitted, reiterating evidence adduced at the trial, that the Accused had been sufficiently connected with the offence.

10. The court has duly considered the evidence on record and submissions filed. It is correct as the defence has submitted that the prosecution case in so far as the Accused's culpability is concerned rests on circumstantial evidence. However, there is hardly any dispute as to the death of the deceased, as a result of a stab wound inflicted on her by an assailant while she was at her home on the material morning; and that she raised an alarm. The stab in the abdomen was no doubt intended by the assailant to cause the victim's death. The key issue for determination is the identity of the assailant. The prosecution evidence is based both on the alleged presence of the Accused at the scene prior to and after the offence and his related conduct.

11. There is no dispute that at the time screams rent the morning air, the Accused was within hearing shot and met with **PW6** who wanted him to accompany him to the source of the screaming, which request he declined. The prosecution witnesses **PW1** and **PW6** testified that earlier, before the screams were heard, the witnesses had seen the Accused on the road near the deceased's home. Admittedly, **PW6** was known to the Accused. For his part **PW1** stated that on previous days and early on the material morning he had seen the Accused person lingering outside the deceased's gate at about 8.00 a.m. as the witness came home from shopping.

12. The witness further stated that, having seen the Accused person two days prior and on the material morning "hanging around" he had asked him to leave. The witnesses said he did not know the Accused as he was not a local in the village. Both **PW1** and **PW6** on the material morning were cross-examined at length regarding those pieces of evidence. They did not waver, and indeed the Accused person admitted that he met **PW6** as the witness narrated, and spoke to him. His admitted response to **PW6's** alleged request to accompany him to help the screaming victim, if believed, is odd. He was headed to work, he said and refused to come with **PW6**. This explanation was supposedly offered to contradict the evidence by **PW6** that on responding to the screams and seeing the Accused at the gate of the deceased, the witness had sought to know what was happening as the Accused was running.

13. This is what **PW6** stated in his evidence-in-chief:

**"(On hearing the screams) I responded immediately. As I left the gate, I met the Accused just by the gate of Wamuthoni's (deceased's homestead) as I got in. He was running out of the gate towards the road. I know the Accused well. I had seen him there (at Wamuthoni's gate) before. There is a road near Wamuthoni's and I would see him. That morning I had seen him in the morning and I said hi. We met by Wamuthoni's gate.**

**When I met him as he was running out, I held him and asked him what was happening. He pointed to a different compound and claimed that "things were bad in that compound". We were alone at the gate at the time".**

**I left him and went towards the direction he had pointed out. When I got to that compound I found there were no people ..... The compound was about 20 metres from Wamuthoni's. The Accused had gone away in a different direction .....**

**"As I was walking back to Wamuthoni's I met two men ...PW1 and PW2 they looked shocked and asked if I had met a young man running away. I told them that I had met a young man running away .... That I had met with Moses running....."**

14. During cross-examination the witness said that on hearing the woman's screaming, he **"reacted immediately in less than one minute."** He stated that having come out of his fenced place of work, he found the Accused person at the deceased's gate, and believed him when he pointed him in a different direction. He denied having met **PW1** and **2** in the initial stage as he went to answer the alarm.

15. Despite retracting the statement that he actually saw the Accused run out of the compound of the deceased, **PW6** was consistent in the substance of his evidence, which, ties in with that **PW1** and **PW2** who came to the scene as **PW6** was misled to go in the wrong direction. **PW1** testified that the first time he set his eyes on the receding figure of the Accused, he was running away, a fact the Accused himself all but admits in his defence. The conduct of the Accused, pointing **PW6** in the wrong direction while leaving the scene at the gate of the deceased, refusing to go in with **PW6** is in my view consistent with evidence by **PW2** and **PW6** that the Accused when sighted, some distance from the gate, was running away. The chase took some time as he and witnesses described. Why was he running away? He did not give any explanation for that conduct or even his presence, idling around the deceased's gate days prior to the offence and on the morning in question, just moments prior to the screams by the deceased. The latter which contradicts his explanation to **PW6** that he could not be minded to inquiring about the screams because he as headed to work.

16. The transaction described by **PW1**, **PW2** and **PW6** moved in quick succession and in light of their immediate response, these witnesses would have found or seen any other person who may have entered the Deceased's home. Events occurred in such quick succession that the men (**PW1** and **6**) were able to pursue and catch up with the Accused as he continued running away from the locale of the incident of stabbing. It is unfortunate that the deceased succumbed before identifying her assailant and that alleged blood stained jacket won by the Accused on arrest was not forwarded, alongside the knife collected at the scene, for DNA analysis. Nonetheless, there is no evidence that **PW6** though known to the Accused had any axe to grind with him, and as for **PW1** he had merely seen the Accused 'idling' in the neighbourhood prior to the incident on previous days and on the material morning but did not actually know him.

17. The Accused person submits that the prosecution case is entirely based on circumstantial evidence. This is attributed to the fact that none of the seven witnesses who appeared before court gave testimony that they in fact saw the Accused person stab the deceased. The testimony of most witnesses points to what they heard, which informed their assumption that the accused had committed the act. For circumstantial evidence to form the basis for conviction it must satisfy certain well known principles.

18. The courts have settled these principles, as unambiguously brought out in the case of **Abanga alias Onyango v Republic CR. A NO.32 OF 1990 (UR)**; as quoted in **Republic v Kelvin Mutwiri Murungi [2016] e KLR HCCR No.36 of 2015 (Formerly Meru HCCR No.73 of 2014)** where the court pronounced itself 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 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 none else.”**

19. In **Joan Chebichii Sawe -Vs- Republic** the Court of Appeal restated the principles applicable in considering circumstantial evidence. The Court observed that:-

**“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the claim of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”**

This passage captures the principles pronounced in the timeless decisions on circumstantial evidence, namely **Republic-Vs- Kipkering Arap Koske [1949] 16 EACA 135** and **Simoni Musoke -Vs- Uganda (1958) EA 715**.

20. In **Musili Tulo -Vs- Republic [2014] eKLR** the Court of Appeal reiterated the need to closely examine circumstantial evidence before making an inference of guilt, the object being to ascertain whether such evidence satisfies the principles in the case of **Kipkering Arap Koske and in Musoke’s case**.

21. In **Tulo’s case**, the courts restated the principles as follows:-

- “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;**
- 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.”**

22. The Court went on to state that:

**”In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the Accused and incapable of any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of **Musoke -Vs- Republic [1958] EA 715** citing with approval **Teper -Vs- Republic [1952] A.C. 480** thus:**

**“It is also necessary before drawing the inference of the Accused’s guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which weaken or destroy the inference.”**

23. According to **PW1** and **PW2**, the victim had told them upon their arrival that that her assailant had fled. If indeed **PW6** was the first respondent at the scene, as it appears, the conduct of the Accused at being found at the victim’s gate and subsequently in misleading **PW6** while taking the opportunity to run away appears to strongly point to him as the assailant. To **PW6** and to this court the Accused did not give a plausible reason for both this conduct or even his presence at the area within the scene prior to and soon after the offence. His unexplained proximity to the home where the offence occurred so immediately after screams of the victim rent the air suggests that he was the assailant, as confirmed by his refusal to accompany **PW6** inside the compound, misleading **PW6** and then taking advantage to escape, and keep running until he was caught.

24. **Lesiit J** in her decision in **R v. Nicholas Ngigi Bangwa (2015) e KLR** relied on the Court of Appeal case of **ERNESTABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990**, where the Court had observed that:

**“In **RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226**, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:**

**The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.**

**This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent available”.**

25. All in all having reviewed the evidence on record, I find that taken in its totality, the prosecution evidence places the Accused person squarely at the scene of the offence and that his presence and conduct prior to and after the event, for which he has given an unbelievable explanation, affords solid corroboration of other circumstantial evidence that he is the person who stabbed the deceased, and was seen by **PW6** while fleeing the scene. I do find him guilty as charged and will convict him as charged.

**DELIVERED AND SIGNED AT KIAMBU THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2019**

.....

**C. MEOLI**

**JUDGE**

**In the presence of:**

Mr. Olaka holding brief for Mr. Njuguna for Accused

Accused present

Ms Ndombi - DPP

Court Assistant – Kevin/Nancy