



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL CASE NO. 4 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PAUL NDUNGU WAHOME.....ACCUSED

JUDGMENT

1. **DAVIDSON MAINA GICHOHI** (deceased) was found dead in his sitting room in Wangwaci area in Sipili Location within Laikipia on the morning of 21st January, 2016. The deceased lived alone; his wife had died some years before. On the compound where he lived also lived his daughter in law Nancy Wangari Guthua **P W 6**. Since he lived alone p w 6 had taken the responsibility of giving the deceased food.

2. On 21st January, 2016 P W 6 stated that the deceased went to Sipili to have his Zuku decoder repaired. Deceased returned home at around 6p.m. P W 6, as she normally did, placed food in for the deceased in his house. When she did so P W 6 noted that the deceased was well.

3. Later in the night while she slept deceased heard their dog barking. She thought that the dog barked because of the presence of elephant. P W 6 stated that elephants often were in their area.

P W 6 also heard stones being thrown to her roof. She did not get out of the house. She continued sleeping.

4. On the following day, 21st January, 2016 P W 6 woke early as she often did. She stated that it was her duty to get milk. When she would go went to get milk she would leave her child under the care of the deceased.

5. On that day, however, she noted there was light at the deceased's house. She also noted that the door of deceased's was not fully closed.

6. P W 6 called deceased's mother and together they went into the deceased's house. This is what she stated in evidence.

"We went together to deceased's home. We saw deceased lying on the chair. He was dead.

... We saw blood on deceased's chest. He was lying on the sofa set but his legs were on the ground... He had been stabbed. He was stabbed 3 times on the chest. We saw a metal bar (chuma)."

7. As a result of P W 6 and deceased's mother's screams members of the public came to their homestead.

8. The post-mortem report was prepared by Dr. Miringu but was produced in court by Dr. Joseph Karimi Kinyua. The post-mortem report revealed that the deceased suffered stab wound to the right thorax, left lobe liver and severed common hepatic vessels and inferior vena cava. As a consequence of those injuries the doctor who performing the post-mortem concluded that the deceased died of massive intra-puritoneal haemorrhage.

9. **Paul Ndungu Wahome** (accused) is charged with the offence of murder of the deceased.

10. No one saw the accused commit that offence of which he is charged. The prosecution relied on circumstantial evidence.

11. The prosecution's witnesses were unanimous, in their evidence before court that the accused and deceased were friend before the year 2014. P W 6 the daughter in law of the ceased stated that she got married to deceased's son in the year 2012. During that time she noted that the accused and deceased were friend. She stated:

“They became friends because both were formers.”

12. That friendship between accused and deceased was confirmed by the chief Paul Nasky (**P W 1**). He stated he was chief of Wangwaci area in Sipili ward, Laikipia West Sub –County.
13. P W 1 stated that both accused and deceased were from his area of duty, Wangwaci area.
14. P W 1 said that the deceased agreed to sell one acre of his five acre land, Sipili/Ndonyoloip Block1/1013 (Laikipia), to the accused. That they prepare the agreement of sale between themselves without involving a third party.
15. In November 2014 the deceased made a complaint to P W 1 that the accused had refused to surrender the title deed after transacting at the Nanyuki Land office, in excising his one acre, that he had purchased. P W 1 summoned both the deceased and accused to his office.
16. The accused on being asked the whereabouts of the deceased title he stated that he completed the transaction of excising the one acre he had purchased. He however said that the deceased’s title was in Nyeri and he needed time to go get it.
17. P W 1 requested the accused to write with his hand that he would produce the title to P W 1’s office. The accused did write as requested. He wrote that he would, the following day at 4 p.m, produced the title: see prosecution’s exhibit No.3.
18. The accused, two days later, went to P W 1’s office with a police abstract showing that he had reported the loss of the title deed. Accused therefore informed P W 1 that he could not produce the title deed as promised.
19. P W 1 proceeded to arrest the accused and referred the matter to Divisional Criminal Investigation Officer (D C I O) Kinamba area. The D C I O asked the accused to produce the deceased’s title, which he did and P W 1 was able to make a photo copy of it which he produce as prosecution exhibit No. 4. That title revealed that the deceased property was registered in deceased and accused’s name as joint owners of the five acres.
20. The D C I O referred the dispute between the accused and deceased back to P W 1. P W 1 decided to transfer the dispute to a higher office. It was then that he referred the matter to Deputy Commissioner. The said Deputy Commissioner made an appointment for both the accused and deceased for 21st January, 2016. It was on that day that the deceased was found killed.
21. On 21 January, 2016 P W 1 was telephoned by Peter Kiroleyi; not a witness in the case, and was told that the deceased had been killed by unknown person. P W 1 teamed up with other security personnel and went to deceased’s home. On reaching at that home they met about 500 members of the public. The security personnel and P W 1 entered into the deceased’s house. This is what P W 1 stated they found:
- “We found the late (sic) deceased’s body lying on a sofa set. On looking at the body we saw a shirt that had a stain on the front part (chest). ... On looking around we found a long metal bar (rod) that had blood stains and further we saw that the deceased’s shirt, it was torn. It had a hole. The body had also a hole where an object had penetrated the body.”***
22. P W 1 further said that the shirt on the deceased’s body was the shirt the deceased wore on 20th January, 2016, when they were together. He was with the deceased when he informed him that the dispute had been referred to Deputy Commissioner Laikipia West on the following day 21st January. 2016 at 10.00 a.m.
23. P W 1 said that the accused was also informed of that appointment at the Deputy Commissioner’s Office.
24. P W 1 said that the metal rod which was found in deceased’s house on 21st January 2016 was in two parts but had been welded together to make it one and that it had been sharpened on one end. The blood was on the sharp part of the metal rod. P W 1 noted that the welding on that metal was fresh.
25. P W 1, because he noted the members of the public were agitated and wanted to burn the accused’s homestead, held a baraza (public meeting). In that meeting P W 1 informed the public of the discovery of the metal rod, and because there were no welders in area, because there was no electricity, P W 1 requested members of the public to inform him of who had welded that metal. P W 1 stated that members of public promised to inquire because the deceased was popular in that area since he had contested a councillors position.
26. P W 1 stated that a welder William Murage Ndungu (**P W 2**) whom he had known for 30 years confirmed he had welded the metal rod recovered from deceased’s home. P W 2 informed police that the accused, when asked what he intended to use the metal rod for, told P W 2 that he wanted to use it to protect his irrigation machine at the dam.
27. P W 2 and Simon Munyua Kiama (**P W 3**) confirmed that on a date between 8th and 10th January 2016 the accused went to the welding place of P W 2 at Sipili with two metal rods. Accused asked P W 2 to weld them together and also asked him to sharpen one end. When accused, later, after ten minutes, went to collect the welded metal rod P W 3 heard P W 2 ask him what he intended to use the rod for. The accused respond by saying he was to use the metal rod in his tomato farm. After welding the rod was about 3 feet.
28. P W 2 and P W 3 knew the accused although they did not know his name. They said that they were able to pick accused at an identification parade.

29. James Wachira Mungori (P W 4) stated that he was a village elder of Wangwaci area. On 20th January 2016 at around 7.20 to 7.25 p.m. he was at the trading center called Digital. He was at a shop purchasing air time for his cell phone. As he did so he saw 4 people. It was then dark. Three of those persons remained in the dark while one, the accused, approached the shop where P W 4 was and where here was light.

30. P W 4 saw that when the accused left the shop he went and joined the three people who were standing a far. P W 4 said those three people were in the company of the accused.

31. P W 4 was also amongst those who entered the deceased's house on 21st January 2016. He confirmed the deceased was dead on the sofa set. P W 4 also confirmed that a metal rod with blood was near the chair in deceased's house. He confirmed the metal rod he saw in deceased's house, as the one produced in this case as an exhibit.

32. The accused in his defence denied the charge of murder.

33. Accused said that the deceased was his friend. That they were village mates. He confirmed deceased sold to him one acre of his land Sipili/Ndonyoloip Block 1/1013 (Laikipia) for Ksh. 100,000. Accused stated that when deceased sold him that land he, the deceased, did not have a title deed. Accused confirmed deceased gave him receipt he had obtained from the company called Laikipia West Farmers Company to enable him obtain title and transact his purchase of one acre.

34. Accused in his defence stated that on 20th January, 2016 he, together with his worker Stephen Kibororo Kariuki **D W 2** worked on accused farm, which is near a dam, up to 1 p.m. that night. He confirmed that at 7p.m. he left his worker, D W 2, who continued working on the farm while he, the accused, went to the shopping center to buy credit for his cell phone. Accused said he went to Digital shopping center. At that shop he met the village elder, P W 4, who requested him, the accused, to buy alcohol for him. He declined to buy P W 4 alcohol because he did not have money. He thereafter went back to the shamba to join his worker, D W 2. He the accused and D W 2 worked upto 12 a.m. Accused said that D W 2 spent that night in one of the houses in his homestead.

35. On the following morning 21st January 2016 accused stated he woke up early to attend the appointment with D C I O Rumuruti. On arriving at D C I O, he stated that, he was arrested and was assaulted by the officers there who wanted him to tell them who had killed the old man (Mzee). Accused said that they failed to tell him which mzee had been killed.

36. Accused denied ownership of the metal rod produced by the prosecution as prosecution's exhibit No. 2., but he confirmed he went to a metal welder in December, 2015 where he had a metal rod made. Accused produced during his defence his metal rod that was made by the welder which was produced as defence exhibit No. 3. That exhibit did not have a sharpened edge.

37. Accused in evidence stated that the metal rod defence exhibit No. 3 was used to hold the water pump in his farm. He stated:

“We use the metal rod (defence exhibit No. 3) to assist in watering the shamba.

38. Accused stated that the evidence adduced by PW 1, the chief, was all fabricated. That he, the accused, did not have a problem or dispute with deceased, after accused produced the title at D C I O's office, in the year 2015. He could not recall the exact date he took the title to D C I O.

39. Accused also stated in evidence that the deceased wanted to sell to him more land but accused declined to buy because he did not have the money. Accused inquired from his friend James Maina, **D W 3**, whether he, James Maina, wished to buy some of deceased's land. D W 3 informed accused that another person Kihara was interested in buying deceased's land

40. D W 2, the casual worker of accused confirmed that on 20th January 2016 he was working, together with the accused, at the accused farm. He, D W 2, stated that the accused left him working at the farm at 7 p.m. that night but returned within 30 minutes. DW 2 said on that night they worked up to 11 p.m.

41. On being cross examined D W 2 stated Defence Exhibit No. 3, the metal rod produce by accused; that he had never seen it before.

42. James Maina Kariuki was D W 3. He testified that in November – December 2014 he sourced a buyer for the deceased as requested by the accused. That the deceased was selling one acres. On a day, which he did not specify, the deceased and the person he had sourced to buy land from deceased, called Peter Kihara, and accused went on the deceased land with the surveyor. That the surveyor measured the land being purchased by the accused and by Peter Kihara. This witness stated that there was no dispute between accused and deceased.

ANALYSIS AND DETERMINATION

43. The prosecution is required to prove beyond reasonable doubt the following:-

(a) Proof of deceased's death;

(b) Proof that death of deceased was as a result of an unlawful act of the accused and;

(c) Proof that the accused unlawful act was with malice aforethought.

44. Death of the deceased was proved by those who were at the scene; that is PW 1, PW 4 and PW 6. These witnesses testified that they

observed that the deceased was dead at the scene. The doctor who performed the post mortem also confirmed the death of the deceased.

45. Was the deceased's death as a result of the unlawful act on the part of the accused?

46. As is will be appreciated from the evidence reproduced above there is no direct evidence of who committed the offence of murder of the deceased. What the prosecution produced was circumstantial evidence.

47. The prosecution's evidence was that the murder weapon was the metal rod, being Prosecution Exhibit No. 2. The government analyst through the report marked as Prosecution Exhibit No. 10 (a) which was dated 5 May 2017, confirmed that the DNA profile generated from the metal rod, prosecution exhibit No. 2, and the shirt worn by deceased at the time of his death, both matched the DNA profile generated from the blood sample of the deceased. Undoubtedly, therefore, the metal rod recovered at the scene was the murder weapon.

48. PW 1, the Chief, PW 4 the village elder and PW 6 the deceased daughter in law, all of them, confirmed that there existed a land dispute between the deceased and the accused. The chief gave a clear insight of the genesis of that dispute. The genesis was that the accused had taken deceased title, in order to process his title of one acre that he had purchased from the deceased, but that the accused refused to surrender the title back to the deceased. This fact was confirmed by the accused who said he took the title to his mother's home in Nyeri but only produced it because the deceased reported that he had stolen his title. The accused in his defence when confirming he did not surrender the title to deceased, as deceased requested, also stated:-

“When I noticed mzee (deceased) is reporting the matter (kustaki) – I took title to DCIO.”

49. There is no doubt that the deceased's insistence on having his title released to him by the accused irritated the accused.

50. Further although the deceased only sold to the accused one acre and entrusted the accused to transact the transfer of that one acre, the accused proceeded to have the whole title of five acres, of the deceased, registered in the joint names of deceased and himself

51. In my view it does seem that the height of the accused's irritation of the deceased reporting him was when he, the accused and deceased were summoned to appear before the Deputy Commissioner Rumuruti. Both the deceased and accused were due to appear before Deputy Commissioner Rumuruti on 21st January 2016, the very day the deceased was found dead in his house.

52. Although motive as per Section 9 (3) of Penal Code is immaterial in as far as regards criminal responsibility, in my view there was no one else, in as far as the evidence adduced before court is concerned, who stood to greatly benefit from the death of the deceased more than the accused. The death of deceased would have stopped the constant reporting to the authorities that accused was detaining deceased's title. It also would have resulted in the accused benefiting from the whole title of five acres of land since he was a joint owner.

53. The court of appeal in the case **LIBAMBULA – V- REPUBLIC [2003] KLR 683** had this to say about motive.

“We may pose, what is the relevance of motive here”. Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act, and is often proved by the conduct of a person. See Section 8 of the Evidence Act Cap 80 Laws of Kenya. Motive becomes an important element in the chain on presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof of it is not essential to prove a crime.”

54. As stated before prosecution relied on circumstantial evidence since there is no direct evidence of who killed the deceased. A useful case to consider when a court is confronted by circumstantial evidence is the court of appeal case **ERIC ODHIAMBO – V – REPUBLIC [2015] eKLR** where it stated: ***“In ABANGA alias ONYANGO V REPUBLIC CR. APP. NO. 32 OF 1990 this court tabulated the conditions 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.”

See also SAWE V. REPUBLIC [2003] KLR 364 and GMI V. REPUBLIC, CR. APP No. 308 of 2011 (NYERI). Before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances, which would weaken or destroy the inference of guilt. (See TEPER V. R. [1952] ALL ER 480 and MUSOKE V. R [1958] EA 715). In DHALAY SINGH REPUBLIC, CR. APP. No. 10 OF 1997 this court reiterated this principle as follows:

“For our part, we think that if here be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an accused is entitled to an acquittal.”

55. Bearing those tests above what evidence links the accused to the murder of deceased?

56. The first is the murder weapon, prosecution exhibit No. 2, the metal rod. That metal rod was confirmed to be the murder weapon because the D N A profile of the blood thereof matched the deceased's D N A profile of his blood.

57. P W 2 and P W 3 were very convincing witnesses. I observed them as they testified and I was satisfied they were truthful witnesses. There was clear evidence, that they knew the accused, although they did not know his name. Two week prior to the murder of deceased P W 3 saw accused take two metal rods to P W 2 and requested P W 2 to weld them together and to sharpen one end. P W 2 was categorical that he could recognise the murder weapon as the metal rod he welded under the instructions of the accused. He was also curious enough to ask the accused what he intended to use the metal rod for. The accused said he wanted to use the metal rod in his farm to assist in irrigation.

58. P W 3, who was an employee at a nearby establish, near to P W 2 welding business, on the material day happened to be outside the premises where he is employed. He saw accused arrive at P W 2 place of business with two metal rods and he heard the accused request P W 2 to weld those rods together and to sharpen one end.

59. There is therefore direct evidence which connects the accused to the murder weapon. The metal rod accused produced as the rod he requested be made by P W 2 was not true evidence. If anything, his lie that it was another rod P W 2 made for him and not the murder weapon only goes to prove that he obtained the murder weapon from P W 2 and that P W 2 and P W 3 were telling lies. I reject the accused's defence regarding the other metal rod.

60. The accused on the night of 20th – 21st January, 2016 was in the company of his casual worker D W 2. They worked together from 9a.m. on 20th January 2016 upto 7p.m. when accused excused himself and said he was going to the shopping center to buy air time for cell phone. It is material to note that the casual worker who often worked for the accused was unable to identify the metal rod produced by accused, in evidence. It follows that accused fabricated evidence in producing that rod.

61. P W 4, the village elder saw the accused who was in the company of three other men who did not want to reveal their identity. They, the three, ensured that they were in an area that was not lit by the shop's lights. According to P W 4 the accused was in the company of those three men.

62. The accused did not cross examine P W 4 on that aspect of that evidence and much more the accused in his defence did not deny that he was with those three men. Who were these men? Why did they not want to reveal their identify? Were these the men who committed the murder?

63. In this court's view the meeting of the accused with these three men, who did not wish to disclose their identity, was not for nothing. I am of view that the accused had his casual worker, D W 2, work with him until late night of 20th/21st January, 2016, as a decoy for the murder that was to be committed, under his instruction, by the unknown person, perhaps the three men who concealed their identity. In working with his casual worker upto late hours it was accused's way of creating an alibi in case suspicion came upon him in respect of the murder of the deceased.

64. The supreme court of Samoa in a persuasive case: **POLICE V PIO [1999] WSSC 50 (12 APRIL 199)** discussed circumstantial evidence and had this to say:

“In dealing with circumstantial evidence we have to consider the weight which is to be given to the united force (or combined effect) of all the proved circumstances put together. You may have a ray of light so feeble that, by itself, it will do little to elucidate (or light up) a dark corner, but, on the other hand, you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.”

65. Bearing that case in mind, the united force of the evidence of the land tussle between deceased and accused; which even accused did not denied; the force of evidence of the metal rod which was welded and sharpened at the request of the accused; and the force of the evidence that the accused was seen in the early evening hours, of 20th January, 2016, in the company of three men who concealed their identity; and the force of evidence that in the night 20th/21st January 2016 the deceased was killed; all converge and united they produce illumination which proves beyond reasonable doubt that the death of the deceased was committed through common intention of the three men, or others, together with the accused. The only rational inference of that evidence is the guilt of the accused. The circumstantial evidence adduced by the prosecution is cogent. That evidence unerringly points to the accused guilty. All the circumstantial evidence taken accumulatively form a chain, in this court's view, which is so complete that renders a conclusion that the murder was committed by common intention of the accused and others.

66. The injuries the deceased suffered leave no doubt that the perpetrators intended to kill the deceased. Accordingly the prosecution proved malice aforethought.

67. In view of the above discussion I find Paul Ndungu Wahome guilty of the murder of Davidson Maina Gichohi deceased. **I accordingly convict him of murder as charged.**

Dated and Delivered at Nanyuki this 19th April, 2018

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue

Accused: Paul Ndungu Wahome

For accused

For state:

Language

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE