



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL CASE NO 12 OF 2015

REPUBLIC

VERSUS

JOHN KITHYULULU

JUDGMENT

INTRODUCTION

1. The Accused person herein, John Kithyululu, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 (Laws of Kenya). The particulars of the charge were that on the 1st September 2015 at California Estate in Taveta Sub-county within Taita Taveta County, he murdered Fredrick Kiarie Mukaru (hereinafter referred to as “the deceased”).
2. After considering the evidence and his and the Prosecution’s Written Submissions on the question of whether or not he had a case to answer, on 31st July 2017, this court found that a *prima facie* case had been established against him and put him on his defence. His case was heard on 17th October 2017.

THE PROSECUTION’S CASE

3. The Prosecution called a total of eleven (11) witnesses to demonstrate the following ingredients of murder outlined in Section 203 of the Penal Code Cap 63 (Laws of Kenya) :-

1. **Proof of the fact and cause of death of the deceased;**
2. **Proof that the deceased met his death as a result of an unlawful act or omission on the part of the accused persons; and**
3. **Proof that the said unlawful act or omission was committed with malice aforethought.**

4. It also submitted that in addition to the above principles, the court must also consider a further principle set out in the case of **Musoke Vs. R (1958) EA 175** where the court cited with the approval the decision in **Teper Vs. R (1952) ALL 480** where it was held as follows:-

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

5. It pointed out that Yohana Fabiano Nada (hereinafter referred to as “PW 1”), the deceased’s wife, found the deceased dead in their house on 5th September 2015. He had deep cut injuries at the back of the head demonstrating that it was a murder. It added that the type of injuries the deceased suffered was proof that whoever assaulted him, intended to cause him grievous harm, if not to kill him.
6. It further averred that the door to their home was not broken into. It was its contention that the Accused person used to work for them as a house boy and that before his employment was terminated he had the key to their home and therefore had access to the said home.
7. It also stated that police found dried blood footprints of the assailant leaving their home, which they concluded belonged to the Accused person herein because when he was arrested, he had an injury to his foot and treatment notes from a hospital, albeit bearing a different name. It stated that when the blood from the foot prints was analysed by the Government Chemist, it was found to match that of the Accused person, which pointed to the fact that the Accused person was present when the deceased was murdered.

8. It further averred stated that when the deceased was found on 5th September 2015, his Nokia 1616 phone with his Safaricom line was missing. It said that the last activity on his telephone line was on 1st September 2015 at about 10.00 pm and thereafter, the same became untraceable. The following day, his phone was used with a mobile phone number that was registered to the Accused person.

9. It submitted that the Accused person failed to provide a credible alibi for his whereabouts on 1st September 2015 and that although he alleged that on the said date he worked for Joshua Olago Achudho (hereinafter referred to as "PW 7") in Holili, PW 7 did not allude to that fact and his advocate did not seek confirmation of that fact when he Cross-examined PW 7.

10. It was therefore its submission that from the totality of the evidence that it tendered, the surrounding circumstances of the case and the Accused person's actions were key to the inference of his guilt and in fact proved that he unlawfully caused the deceased's death.

THE ACCUSED PERSONS CASE

11. The Accused person gave sworn testimony denying having committed the offence. He argued that the entire prosecution case was based on suspicion because no one witnessed the deceased's murder, no one saw him enter the deceased's home and take a phone from therein. He urged this court to accept his assertion that he collected the deceased's phone along the road and proceeded to use it without having been aware of the murder incident. He contended that the Prosecution's assertion that the blood from the dried foot prints in the deceased's house matching him was a frame up by the Prosecution upon discovery of the said phone.

12. He was categorical that he returned the keys to the deceased's home after his employment was terminated. He urged this court to treat PW 7's evidence with caution because he recorded his statement while he was in custody as a prime suspect and that there was a high probability that he implicated him to secure his own release.

13. It was therefore his submission that the Prosecution failed to adduce evidence that pointed to any unlawful act on his part which would have caused the death of the deceased and urged this court to acquit him under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

LEGAL ANALYSIS

14. PW 1 testified that she worked at Eldoro Girls High School where she lived during the week and stayed with the deceased in their matrimonial home at California Estate in Taveta on Fridays and Saturdays. The deceased would stay with either a house girl or house boy. Their children were away in secondary school at the material time.

15. She testified that the last time she saw the deceased was on Monday, 31st August 2015 at around 1.00 pm when she passed by his office on her way to work. They spoke later that day at around 9.00 pm when he told her that the house girl had not come back that day and asked her to look for a house boy. She stated that she called him back later that evening but the call did not go through. She testified that she called him the following day but his phone was off ("mteja").

16. On 5th September 2015 at about 11.00 am, she passed by the deceased's office where she found one Janet Gitonga (hereinafter referred to as PW 2). PW 2 used to clean his office and had rented a part of his office for her tailoring business. She said that PW 2 informed her that she had not communicated with the deceased for about two (2) days as he had not gone to the office. They then went to PW 1's house and found the gate locked. PW 2 corroborated PW 1's evidence in this regard.

17. When PW 1 opened the house, they found drops of blood and blood flowing under the bed in the children's bedroom with the deceased lying on his stomach with cuts on the neck. Police came and took his body to the mortuary. The Postmortem was carried out on 8th September 2015 at the Taveta District Hospital in PW 1's presence and that of her brother-in-law, Harrison Mwangi, and her two (2) children.

18. She told the court that the deceased had two (2) phones, a Nokia with a Safaricom line and a Huawei phone that had several lines. She identified the deceased's phone that went missing in court. She confirmed that the deceased had employed the Accused person alias "Pastor" sometime in June 2015 when his house girl left and he gave him the house key as he moved into the house.

19. She stated that the deceased terminated the Accused person's employment because he used to bring women to the house. She was emphatic that the Accused person did not return the key to the house and added that at one point, they noticed that the alternative keys for their children disappeared and when the deceased traced the Accused person to where he had moved to, he found their carpet at his house. The deceased asked the Accused person to return both the keys and the carpet, which he did sometime in August 2015. She also testified that their Television set that was stolen on 18th August 2015 was also found in his house. Her yellow and green curtains were also found in his house. She identified the stolen items in court.

20. Domitila Kanini Mwangangi (hereinafter referred to as PW 3), the Accused person's landlord, confirmed that he rented her house on 5th August 2015 and moved in with his wife called Valentine. She said that he did not have money but he gave her Kshs1000/= after telling her that his mother was sick. He paid further monies after she pestered him several times and on 2nd September 2015, he paid her husband Kshs 9000/=, being rent for the months of September, October and December with a promise to pay the balance of the deposit.

21. Chief Inspector No 235243 Peter Kyalo (hereinafter referred to as PW 4) worked at the Forensic Crime Scene Support Services in Voi. He confirmed having received a CD containing photographic evidence from No 47782 Corporal Robert Kariuki (hereinafter referred to as "PW 10") from which he processed seven (7) photographic prints. He tendered the same in evidence.

22. The Principal Analyst with Government Chemist Mombasa, George Lawrence Oguda (hereinafter referred to as "PW 5") confirmed having received six (6) exhibits namely a sword in a sheath, a kitchen knife, and clotted blood in a swab, blood sample from the Accused person, panga and shirt. He concluded that the clotted blood in a swab and on the shirt matched the DNA profile of the Accused person.
23. Agricola Gasper (hereinafter referred to as "PW 6") was a niece to PW 1. She testified that on 17th September 2015, she had hang clothes on the line when they were blown by the wind towards the fence. It was then that she saw a blood stained panga outside the fence. The said panga was handed over to the police.
24. PW 7 testified that on 13th September 2015 at about 5.30pm he was about to finish work at a construction site near Jamia Mosque in Taveta when the Accused person approached him and asked him to lend him Kshs 200/=. Although he had initially refused to lend him money because he had a debt of Kshs 200/= for food he had eaten, he caved in after he pestered him a lot and accepted a phone make Nokia 1616 black in colour as security.
25. He told the court that the Accused person returned the following day around the same time when they were finishing work and told him that he did not have money so he wanted to sell the phone to anyone so that he could pay him the Kshs 200/= he owed him. The Accused person asked him for Kshs 600/= for the phone but he gave him Kshs 400/= instead.
26. While he was at work at a place called Spring Water on 18th September 2015, one Abdile Oloo and four (4) police officers came and asked him about the phone. He informed them that the Accused person sold him the phone. He took the police to his house and gave them the phone which was in his house. He identified the phone in court. He further stated that he had not used the phone or even put in a line. During his Cross examination, he told the court that he and the Accused person did not have a written agreement for the sale of the phone. He was arrested but was released from custody the following day after he recorded his statement. PW 7 identified the Accused person as the person who sold him the phone.
27. Inspector No 56444 George Ochieng (hereinafter referred to as PW 8) and PW 10 reiterated the evidence that was adduced by the Prosecution witnesses. He confirmed that the police recovered a Black Phillips TV, Safaricom plate serial number 89254028781004017968, Identity Card Number 29220858 with the name John Kithyululu Mwangangi which bore the Accused persons likeness and a treatment book from Taveta sub-county hospital for one **"John Mutua"**.
28. He also stated that following a further search in the Accused person's house on 17th September 2015, they recovered newly bought items curtains, carpet, six (6) plastic chairs, two (2) plastic tables, sheers and a blood stained torn shirt. He testified that they submitted the blood stained panga, the blood stained shirt, the sword and knife found at the scene, dried blood collected at the scene and a sample of the Accused person's DNA to the Government office for analysis.
29. He said that he wrote to Safaricom to establish if the phone had been in use during the said period. The investigations established that the deceased's number 0724503517 used the phone handset with the IMEI number 359043047790380 until 1st September 2015. From 2nd September 2015 to 10th September 2015 the number using the handset was 0717605056 registered to Identity Card Number 29220858 John Kithyululu Mwangangi.
30. He testified that they found the Accused person with the deceased's mobile phone Nokia 1616 and he was the one who referred them to PW 7 who worked as a mason in Taveta town and that they recovered the phone from his house.
31. No 70455 Corporal Faizal Jama (hereinafter referred to as "PW 9") worked at the Safaricom offices in Nairobi as a Data Analyst. His duties entailed extracting call data and data from Mpesa statements, having received training from both Safaricom and CID Training School. He confirmed that after his investigations, he established that the deceased person's mobile number 0724503517 used the phone handset with the IMEI number 359043047790380 until 1st September 2015 8.55.59pm. He stated that from 2nd September 2015 2.39.39 pm to 10th September 2015 the number using the handset was 0717605056 registered to Identity Card Number 29220858 John Kithyululu Mwangangi.
32. Corporal No 47782 Robert Kariuki (hereinafter referred to as PW 10) testified that he worked at the DCIO office Taveta CID Department as an investigator. He stated that they also found a treatment book from Taveta sub-county hospital for one **"John Mutua"** for treatment of a digit toe and a receipt dated 2nd September 2015. He said that they made an inventory of all the items that they took from the Accused person's house, which was signed by both the Accused person's wife and the Accused person.
33. Dr Omar Lewa (hereinafter referred to as "PW 11") produced the Post Mortem Report on behalf of Dr Asabi whose medical opinion was that the deceased died as a result of a traumatic head injury secondary to cut wound with resultant intradural and extradural haematomas.
34. The Accused person testified that he was employed by the deceased person as a caretaker for a period of only one month. He told the court that he returned the key and the carpet the deceased had lent him to cover a hole in his house. His evidence was that he picked a phone along the road in Taveta near the airstrip while on his way to work in a construction site. He stated that what was picked was not considered stolen. In his Re-examination, he told the court that he thought a drunkard or a "boda boda" rider had dropped the mobile phone and that if he had known it would implicate him in a murder case, he would not have picked it. He admitted having sold the phone to PW 7.
35. The offence of murder is defined in Section 203 of the Penal Code as follows:-

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

36. This definition gives rise to four (4) crucial ingredients of the offence of murder all four of which the prosecution must prove beyond a reasonable doubt in order to prove the charge. These are:-

- i. The fact of the death of the deceased.**
- ii. The cause of such death.**
- iii. Proof that the deceased met his death as a result of an unlawful act or omission on the part of the Accused persons,**
- iv. Proof that said unlawful act or omission was committed with malice aforethought.**

37. In the case of Libambula vs Republic (2003) KLR 683, the Court of Appeal rendered itself on the question of motive as follows:-

“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 Evidence Act Cap 80 Laws of Kenya.

Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.”

38. Notably, on the fact of the cause of death of the deceased, there cannot be any doubt as the cause of death was confirmed by PW 11 in the Post Mortem Report. The deceased died as a result of a large wound on the left temporal aspect of the skull measuring approximately fourteen(14) inches wide and one and half(1 ½) inches deep and a cut wound on the right hand measuring approximately 3 inches long by 1 inch deep. Dr Gasambi’s medical opinion on the cause of the deceased’s death was proof that the deceased did not die of natural causes.

39. The photographs produced by PW 4 and the results of the Post Mortem Report were proof that whoever assaulted the deceased intended to cause him grievous harm, if not to kill him. There was clearly malice aforethought. Under Section 206 of the Penal Code, malice aforethought is defined as follows:-

“Malice aforethought shall be deemed to be established by evidence proving anyone 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 act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony”.

40. Ingredients (1), (2) and (4) of the offence of murder had been proved herein. What remained for determination was whether the deceased met his death as a result of the Accused person’s actions or omissions.

41. The Prosecution did not adduce any evidence that anyone witnessed the deceased’s murder. However, the house had not been broken into, pointing to “inside job” where the assailant had access to the house. The Prosecution was able to prove that the Accused person not only knew the deceased but that he had worked for him barely a month before he met his death.

42. He had access to the deceased’s house because he had been given a key by the deceased, which PW 1 said he returned. PW 8 and PW 10 both stated that they did not find any duplicate keys in the Accused person’s house during their searches. Although the Accused person averred that he did not know if someone could duplicate a key, this court found the same to have been a mere denial on his part. In any event, PW 1 had pointed out that she had noted that the spare keys for the children had gone missing and had not been traced. It was not demonstrated that the said keys were ever recovered.

43. There was no doubt in the mind of this court that proof of the Accused person’s access to the deceased’s house was demonstrated by the discovery of the missing TV set and curtains belonging to PW 1 and the deceased, which items she identified in court.

44. From the call data records produced by PW 9, whose evidence was so detailed and left nothing to chance, the deceased’s phone went off and was used by the Accused person. The forensic evidence from the samples of blood that was adduced by PW 5 placed the Accused person at the murder scene. The dried blood foot prints in the deceased’s house belonged to the Accused person on account of the DNA evidence. He was unable to explain how his blood was found in the deceased’s house. He did not adduce any evidence to suggest that there was a possibility of there having been two (2) assailants.

45. The evidence of the treatment book from Taveta sub-county hospital for one **“John Mutua”** for treatment of a digit toe was consistent

with the observation made by PW 10 of the Accused person's injured foot when he was arrested. It ably showed that the Accused person sought treatment under an assumed alias in attempt to escape detection. Those were the actions of a guilty person and/or actions that led this court to infer guilt on his part.

46. As was pointed hereinabove, this was a case that was based on circumstantial evidence. However, the circumstances showed that it was one instance where the burden of proof shifted to the Accused person to displace the Prosecution's evidence by demonstrating that another person other than him could have caused the deceased's death.

47. In the case of **Republic vs Mjomba Jason Mwambili [2016] eKLR**, this very court rendered itself on the issue of circumstantial evidence when it stated as follows:-

“Circumstantial evidence can be accepted when an accused person's guilt can be inferred based on the evidence adduced by the prosecution in which case it can only be displaced by an accused person giving his side of the story. The chain of events in a case based on circumstantial evidence must be so connected that an accused person would find it difficult, if not impossible, to extricate himself or herself from the unlawful act he is being accused of.”

48. Although no one witnessed the Accused person kill the deceased, the court found and held that all the circumstantial evidence adduced in this case pointed irresistibly to his guilt. The court further found that the circumstances of this case taken cumulatively formed a chain so complete that there was no escape from the conclusion that within all human probability that he committed the offence. He did not adduce any evidence or co-existing circumstances that could weaken or destroy the inference of guilt against him.

49. PW 9's evidence that linked the Accused person to the deceased through the deceased's phone was so thorough due to the IMEI numbers that it displaced the Accused person's evidence that he picked the deceased's phone on a road. The coincidence of the Accused person randomly picking the phone was so farfetched and was displaced by the fact that he had been the deceased's employee a month before his death.

50. The burden shifted to him in accordance with Section 111 (1) of the Evidence Act Cap 80 (Laws of Kenya) for him to explain how he came to randomly pick a phone of a person he was working for, which person was found killed in his house when it showed no signs of forceful entry.

51. Section 111(1) of the Evidence Act provides as follows:-

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence...”

52. Accordingly, having carefully considered the evidence that was adduced by both the Prosecution and the Accused person, the court found that although there was no direct evidence implicating the Accused person in the death of the deceased herein, the Prosecution proved its case to the required standard, which was proof beyond reasonable doubt by demonstrating that the deceased met his death as a result of the unlawful acts or omissions on the part of the Accused person and that the alleged unlawful acts or omissions were committed with malice aforethought on his part.

DISPOSITION

53. For the foregoing reasons, the Accused person is hereby found guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and this court convicts him accordingly.

54. It is so ordered.

DATED at NAIROBI this 25th day of May 2018

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at VOI this 30th day of May 2018

F. AMIN

JUDGE

In the presence of:-

Mr Mwinzi holding brief for Muthami for Accused

Miss Anyumba for State

Josephat Mavu– Court Clerk