



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 52 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

SALOME WANJIKU KUNGU.....1ST ACCUSED

TOM CHEGE MBITHI alias RASTA.....2ND ACCUSED

JUDGMENT

Salome Wanjiku Kung'u, 1st accused, and Tom Chege Mbithi alias Rasta, 2nd accused, are jointly charged with another not before the court with the murder of George Mbithi Mwaura, the deceased, contrary to section 203 as read with section 204 of the Penal Code. The offence is alleged to have been committed on the night of 22nd and 23rd June 2014 at Wabuga Village in Kikuyu Sub-County within Kiambu County. Each accused person denied committing this offence. They were initially represented by Mr. Mbiyu, learned counsel, until 17th May 2018 when this court discharged Mr. Mbiyu from representing the accused persons. The reasons given by Mr. Mbiyu in his application to be discharged were that the 1st accused had failed to communicate with him and that the 1st accused had jumped bail. This court directed that the accused persons be assigned defense counsels. At the time this was happening the proceedings were at the defense stage. Ms Ajiambo, learned counsel, was appointed to represent the 1st accused while Mr. Oundu, learned counsel, was appointed to represent the 2nd accused person. The defense case was heard and concluded thereafter.

I need to mention that the 1st accused is the mother of the 2nd accused. The deceased was the husband of the 1st accused. According to Susan Wanjiru Mwaura (PW5) who is mother to the deceased and mother in law to the 1st accused, the accused and the deceased had been married for a number of years before the deceased died and that at the time of that marriage, the 1st accused had two sons, the 2nd accused and another, and that the deceased did not have any children. I guess she meant that the deceased did not have any biological children with the accused.

The deceased and John Njoroge (PW1) a cousin and a neighbour were together on the evening of 22nd June 2014 at 7.30pm. They walked home together until they reached the gate of the deceased's compound. The deceased entered into his compound leaving John to continue walking towards his home. John told the court that the deceased was dressed in a blue trouser and jacket. John arrived at his home and went to sleep later on that evening. He was woken up by screams on 23rd June 2014. He heard people saying that the deceased had died. He went to the scene and saw the body of the deceased lying beside the road about ½ kilometres from his (deceased's) home. The deceased was dressed in blue track suit.

The news about a body lying by the roadside reached PC Timothy Boinnet (PW10) in the morning of 23rd June 2014 through a member of the public. PC Boinnet was at the time attached to King'eero Police Post under Kikuyu Police Station. He reported to his superior CPL Kanake (not a witness) the Officer in Charge of the Police Post. CPL Kanake assigned PC Boinnet and another officer to attend to the matter. The two officers went to the scene of the crime and confirmed that indeed there was a body lying on the ground beside the Kabete/Wangige Road a few metres from the tarmac. The officers were informed by the members of the public gathered at the scene that the body was that of George Mbithi Mwaura a businessman from the area. PC Boinnet secured the scene. He was joined shortly thereafter at the scene by police officers from Kikuyu Police Station, among them CPL Frank Anunda who took photographs of the scene and the body of the deceased. Subsequently, the body was removed and taken to the City Mortuary while the accused persons were taken to Kikuyu Police Station where they were detained pending investigations after which they were charged with this offence.

The accused persons opted to give unsworn defense. In her defense, the 1st accused told the court that her husband the deceased got home at 7.00pm on 22nd June 2014; that she served him food and prepared water for the deceased to bath after which he watched television; that the deceased received a call from his mother PW5 at about 8.00pm to go to her home to discuss an issue; that she gave him a black track suit with yellow on both sides and a black T-shirt with a red patch in front, a jacket and black shoes to wear and that the deceased left after telling her that he would pass by Wangige shopping centre to collect money proceeds from a Matatu they operated. She testified that she waited for him to come home up to 9.30pm when she decided to call him to find out where he was. She said that she noticed that he had left his phone at home charging; that she called PW5 to find out if the deceased was at her home but PW5 was not reachable. She said she then went to bed

with no worries because the deceased used to spend the night at times in PW5's home. She testified that in the morning on 23rd June 2014 she woke up and started preparing her grandchildren to go to school while her sister collected clothes to wash when she heard screams at their gate. She said that she learned later that her husband had been found dead beside the road and that on receiving this news she fainted.

She told the court further that she lived with university students who have rented rooms in her compound and had a watchman guarding the homestead. She said that the police did not recover anything from her house save the deceased's telephone. She testified that PW1 asked her for something to cover the deceased's body with and he picked a mattress cover which was one of the cloths being washed; that PW1 came back shortly and asked for a heavy material to carry the body of the deceased with and picked a bed cover that was also being washed; that PW1 took back the mattress cover and placed it together with the other clothes. She said that her relationship with PW1 was not good because she had refused to eject PW1's wife from the room she (PW1's wife) had rented from her and that this had made PW1 very bitter. She testified that PW1 had vowed to revenge. She said that she joined the police to take the body to the mortuary and that PW1 did not go with them but remained at home with some police officers. She said that she found the wet clothes her sister had been washing at the police station. She said the clothes exhibited in court got stained with blood because they were used to carry the body of the deceased. She denied involvement with the death of the deceased and stated that the deceased was last with PW5.

The 2nd accused testified that on 23rd June 2014 their watchman, one Titus Mulandi, woke him up very early to hand over to him the tools he had been using to work; that he received the tools and went back to sleep; that at 6.30am he heard a lot of noise and woke up; that he went outside his room to find out what was happening; that he learned that his father had died and saw the body; that police arrived and started investigations; that he cooperated with the police and assisted to take the body to the mortuary; that police took him and his mother to the police station where they were interrogated and placed in cells and that they were later charged with this offence. He denied the charge and said that he had nothing to do with the death of the deceased. He further told the court that he did not know that the deceased was not his biological father and that these rumors started after the death of the deceased.

At the conclusion of the case for the defense, Ms Ajiambo, learned counsel for the 1st accused did not wish to submit. Mr. Oundu learned counsel for the 2nd accused made brief submissions in which he told that court that none of the prosecution witnesses has mentioned the involvement of the 2nd accused with this offence; that the theory by the police that the deceased was killed inside the house and dragged outside is not supported by evidence; that the 2nd accused is only mentioned by PW10 who testified to finding many people including the 2nd accused at the scene of the crime; that there is no evidence that the 2nd accused lived in the house of his parents and that there is nothing connecting him with this offence. Mr. Oundu submitted that the 2nd accused did not know that the deceased was not his biological father and that he came to know this after the deceased had died. He submitted that it cannot be said that the 2nd accused killed the deceased because he was his step father and that motive on the part of the 2nd accused has not been established. Mr. Oundu urged that this court finds that the prosecution has failed to prove the case of murder against the 2nd accused beyond reasonable doubt and acquit him forthwith.

Mr. Okeyo learned prosecution counsel submitted that the prosecution has proved beyond reasonable doubt that the accused persons murdered the deceased. He submitted that there is evidence proving that the unnatural death of the deceased occurred; that the body was found beside the road when evidence shows that the deceased was killed inside the house; that at the time of his death the deceased was dressed in different clothes than what he had worn on 22nd June 2014 when he was in the company of PW1; that the clothes of the deceased were found to be bloodstained and that the accused persons who were found in the compound are linked to the death of the deceased.

Mr. Okeyo further submitted that the prosecution has proved malice aforethought on the part of the accused persons; that the marriage between the accused and the deceased was not a peaceful one as testified by PW5 and that the deceased was planning to marry again; that the children of the 1st accused are not biological children of the deceased and that the deceased had sold his land shortly before he died. Mr. Okeyo submitted that the prosecution has proved beyond reasonable doubt all the ingredients of murder and urged this court to find so and convict the accused persons.

The law places the duty of proving the offence of murder on the prosecution. The prosecution must tender evidence to prove that a death has occurred; that the said death is unnatural; that the death was caused by an unlawful act or omission on the part of the accused under trial and the element of malice aforethought on the part of the accused. In the matter before me, the occurrence of the death of the deceased is not disputed. There is evidence to prove beyond reasonable doubt that the body of the deceased was found lying on the ground beside Kabete/Wangige Road on the morning of 23rd June 2014 and that it was transported to City Mortuary where it was examined by Dr. Oduor Johansen (PW7) on 26th June 2014. The body was identified to the doctor by Lucy Wairimu Mwaura (PW2) a sister to the deceased and Francis Wandara Rwigy (PW3) husband to Lucy and brother in law to the deceased. Dr. Oduor found multiple head injuries. He found horizontal curved cut wound measuring 6cm long and another horizontal curved cut wound measuring 4cm long and 5cm long and other 6 horizontal curved cut wounds measuring 2cm long. All these wounds were concentrated at the back of the head. He found haematoma of the scalp at the back of the head and bleeding beneath the scalp and in the brain. Dr. Oduor confirmed that the deceased died due to head injuries due to sharp trauma. It is my finding that this evidence proves beyond reasonable doubt that the unlawful death of the deceased occurred.

In respect of the second issue whether the accused persons or any of them caused that death, I have carefully examined all the evidence. The deceased walked home with John Njoroge (PW1) at about 7.30pm on the evening of 22nd June 2014. John left the deceased having entered into his compound as John continued walking to his own home. That the deceased arrived home that evening is not disputed. It is confirmed by the 1st accused who told the court that the deceased arrived home that evening at about 7.00pm. The evidence of the 1st accused is that she served the deceased with some food which he took. She also testified that her husband took a bath and watched the television. She said that the deceased left to go to his mother's house at about 8.00pm and never returned home that night. She told the court that she gave the deceased clothes to change. She described them as a black tracksuit with yellow on both sides, black T-shirt with red patch in front and a jacket and black shoes. Susan Wanjiru (PW5) confirmed to the court that the deceased went to see her that evening and they discussed about his marriage to another wife. She told the court that the deceased was not happy with his marriage to the 1st accused and wanted to marry another wife. She also told the court that she discussed with the deceased the issue of his having sold some land. PW5 told the court that the deceased claimed that in the event that he disappeared, it would be because of the 1st accused. It was not clarified what the deceased meant by disappearing, whether he meant going away from home or he meant dying.

There is no other evidence on the circumstances leading to the death of the deceased. It is clear to me that the clothes the deceased wore at the time of his death are not the same clothes he was wearing when he walked home with PW1. This has been confirmed by both PW1 and the 1st accused. There is no direct evidence by the prosecution as to what happened between the time the deceased went to see his mother PW5 and the time he died. According to the 1st accused, the deceased did not return home and the last person to be with him alive is his mother PW5. There is no evidence that the deceased spent the night at PW5's house. PW5 told the court that she did not hear any commotion from the home of the deceased and that if there was such commotion she could not hear it due to the loud music from the home of the deceased. That there was loud music at the home of the deceased was also mentioned by PW1 who told the court that he asked the deceased why there was loud music and the deceased had told him that it was probably Chege (2nd accused) playing the music. PW5 was not cross examined by counsel for the accused persons on whether the deceased spent the night at her home that evening.

With no direct evidence to inform this court on the circumstances leading to the death of the deceased, this court will turn to circumstantial evidence to resolve this case. There is evidence from PW5 that the couple, deceased and 1st accused, always had domestic disputes. Evidence shows that the two children (sons) of the couple, the 2nd accused and another whose identity was not given to the court, were not the biological children of the deceased with the 1st accused. They were sons of the 1st accused. It seems that the deceased had adopted them as his sons after he married the 1st accused. It seems that the deceased was not happy with his marriage to the 1st accused and wanted to marry another wife and have children with her as testified by PW5. The picture painted by the two accused persons in their defense is different. They portrayed a picture of a peaceful life with the deceased, a caring and loyal wife on the part of the 1st accused and a loving son on the part of the 2nd accused.

The evidence of PC Timothy Boinnet is crucial to this case. He was the first police officer in company of his colleague PC Kangangi (not a witness) to arrive at the scene. His evidence on what he found upon arrival at the scene is captured as follows:

“I analyzed the scene and found that the body had injuries at the back of the head..... There was Napier grass at the scene. It had no traces of blood and scene was not disturbed. Body has signs of washed wounds. There were no blood clots on the wounds. About 30 metres away I found one shoe black in colour. It is this one. This is for the right foot. The left foot shoe was being worn by the deceased. I observed the scene and I decided to visit the residence of the deceased. The body was dressed in black track suit with stripes. It had no stains of blood or mud. It was wet and clean. At the residence I found the wife of the deceased. I told her to accompany me inside the house. In the sitting room I found it had been cleaned..... I entered the bedroom. I found deceased's mobile phone..... Outside the house I found basins. I checked the contents and found one bedcover. It was soaked in one of the basins. The second basin had a bedcover and track suit. The clothes had traces of blood. I decided to take the basins and the clothes to the Government Chemist to determine presence of blood.”

Further evidence from PC Boinnet is that before he left the scene he received information from Ndongoyo Primary School, about 400 metres from the scene where the body was found, that pupils from that school had seen blood stained sacks near the school. The officer went to the school and recovered two manila sacks (Ex. 15 (a) and 15 (b)). He also recovered a claw hammer (Ex. 14) at the same place. The hammer had blood stains on both the blunt and the pronged sides. The claw hammer (item 'B'), manila sack (item 'C'), Bed cover (item 'E'), Mattress cover (item 'G'), deceased's blood sample (item 'A') and 1st accused's blood sample (item 'K') were taken to the Government Chemist Laboratory and examined by Ms Elizabeth Waithera Oyiengo (PW6). She examined them and found that the claw hammer (item 'B') and the mattress cover (item 'G') were lightly stained with blood of human origin. The bed cover (item 'E') and manila sack (item 'C') were moderately stained with blood of human origin. The DNA profiles generated from the hammer and bedcover matched the DNA profiles of the blood sample from the deceased leading to the conclusion the bedcover collected from the basin where it had been soaked and the claw hammer found near the school compound were stained with the blood from the deceased. Ms Elizabeth Waithera told the court that the other items did not produce any DNA profiles for comparison.

I have examined the photographs produced in court as Ex. 1-11. I agree with PC Boinnet that the scene is not disturbed and shows no blood stains. The picture one gets upon close scrutiny of these photographs and the general scene where the body lay is that the deceased was not killed at the scene. The photographs further reveal that the clothes the deceased was wearing at the scene are not stained with blood, at least not heavily so. I agree with PC Boinnet that the wounds at the occipital region of the deceased's head seem to have been cleaned or the blood wiped away. The area with the injuries which are concentrated at the occipital region of the head does not have clotting blood. The wounds in the photograph marked Ex. 8 appear clean with minimal bleeding.

The finding of deceased's blood on the bedcover is an indication that the deceased was killed inside the house and probably in his bed. Evidence shows that several cloth items were found soaked in two basins and that these items were stained with blood. Among the items mentioned in evidence by PC Boinnet that he found in those basins are the bedcover (item 'E') found to contain stains of blood from the deceased and track suit among other items. Most of these items did not produce DNA profiles perhaps because as testified by Ms Elizabeth Waithera, the DNA had degenerated. The claw hammer was also stained with deceased's blood and indication that it may have been the murder weapon or that it came into contact with the body of the deceased.

My careful examination and consideration of the evidence on record leads me to conclude that the deceased was killed inside his house and his body taken to the scene by people who aimed to conceal that fact. The blood stained manila sack and the blood stained claw hammer that were found near the school compound are also connected with this matter: the hammer in my view could have been used as the murder weapon or one of the murder weapons and the manila sacks may have been used to transport the body from the house to the scene where it was found. The evidence by the 1st accused that the bedcover and the mattress cover were stained with deceased's blood because they were used to carry the body of the deceased cannot be true when I consider the evidence of PC Boinnet. This officer saw these bloodstained clothes before the body was collected from the scene according to his evidence. The issues brought into evidence by the 1st accused to the effect that the bedcover and the mattress cover were stained with blood when the same pieces of clothes were used to carry the body of the deceased were not put to the prosecution witnesses in cross examination. This is the only way this evidence by her could have been verified. The 1st accused's evidence that the deceased did not go home on the evening of 22nd June 2014 after he went to meet his mother is not supported by evidence. I am alive to the legal principles that an accused person has no duty to prove his/her innocence. However, the evidence of the 1st accused does not controvert that of the prosecution through circumstantial evidence that the deceased was killed inside his

house.

The legal standards to be met when a court is relying on circumstantial evidence are set out in various authorities including Sawe v. Republic [2003] KLR 364, R. v. Kipkering arap Koske & another 16 EACA 135, Kiriuki Karanja v. Republic (1986) KLR 190 and David Wahome Wanjohi v. Republic [2015] eKLR. The common thread running through these authorities can be summarized as follows:

(i) 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.

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

(iii) 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.

In order to convict an accused person basing the case on circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the accused not guilty (see David Wahome Wanjohi v. Republic (supra)).

I have considered the evidence of the prosecution that the scene where the body was found had not been disturbed and there was no bloodstains; that the clothes the deceased wore were not soaked in blood as would have been the case if the deceased was killed while wearing those clothes; that the clothes found by PC Boinnet soaked in basins behind the house had blood in them and that the bedcover was found to have deceased's blood; that the claw hammer recovered from the school compound about 400 metres from the body had deceased's blood and that the deceased was left by PW1 after he had entered his compound. I have considered the same and subjected it to the legal test of circumstantial evidence. I am satisfied that this evidence is cogent and firm and that it unerringly points towards the guilt of the 1st accused. When these circumstances are taken cumulatively, they form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the 1st accused and no one else. My careful consideration of the evidence leads me to conclude that the 1st accused cannot escape culpability. She may not have been alone in committing this offence but I do not have any evidence that conclusively points to the involvement of the 2nd accused in the murder of the deceased. It is shown in evidence that the 2nd accused lived in his house located near the gate as shown in the sketch plan Ex. 19. Other than the evidence by the police that the 2nd accused was found at the scene of this crime with other members of the public, I find no other evidence, even circumstantial evidence, that he was involved in the murder of the deceased. As I have indicated, I have no evidence to show that the 2nd accused lived with his parents in the same house. He may be suspected of having participated in killing the deceased but suspicion alone is not sufficient to base a conviction on (see the case of Sawe v. Republic).

Having considered the circumstances of this case as shown above, it is my finding that I am satisfied that the evidence presented in this case passed the test of circumstantial evidence. This evidence proves beyond reasonable doubt that the 1st accused was involved in the death of her husband. As I have shown, this proof is based on circumstantial evidence given that there is no direct evidence. Proof of the two ingredients of murder leaves only the element of malice aforethought to be considered.

Turning on malice aforethought, I have considered all the circumstances leading to the death of the deceased. The motive for this murder could have been due to the domestic disputes between the accused and the deceased caused either by his threat to marry another wife or any other reason. Although the 1st accused painted a picture of a loving relationship between her and the deceased, this is not the case, given the evidence of PW5. I have noted that most of the evidence by the 1st accused was not tested through cross examination of the witnesses including PW5 her mother-in-law. It therefore comes out as an afterthought. In determining the element of malice aforethought, my attention is drawn to the case of Bonaya Tutu Ipu & another v. Republic [2015] eKLR where the Court of Appeal stated as follows:

“It is in rare circumstances that the intention to cause death is proved by direct evidence. More frequently, that intention is established by or inferred from the surrounding circumstances. In the persuasive decision of Chesakit v. Uganda, Cr. App. No. 95 of 2004, the Court of Appeal of Uganda stated that ‘in determining in a charge of murder whether malice aforethought has been proved, the court must take into account factors such as the part of the body injured, the type of weapon used, if any, the type of injuries inflicted upon the deceased and the subsequent conduct of the accused person’”

It is the duty of this court to take into account all the surrounding circumstances of this case as stated by the Court of Appeal in N M W v Republic [2018] eKLR. I have done so and I note that the injuries sustained by the deceased were concentrated around the occipital region of his head. There was bleeding beneath the scalp and in the brain. The injuries were caused by a sharp object going by the evidence of Dr. Oduor. A claw hammer found at a school nearby had blood from the deceased and this could have been the murder weapon or one of the murder weapons. Given the nature of the weapon used and the injuries sustained, it is my considered view that the intention was to cause the death of or grievous harm to the deceased. There was also an attempt to conceal the identity of perpetrators by dumping the body at the scene. It was made to look like the deceased was killed by any other person. However the bloodstained clothes recovered behind the house, specifically the bedcover, contained blood from the deceased. With this evidence, I am convinced that malice aforethought has been proved beyond reasonable doubt.

I will conclude this matter by stating that the prosecution has discharged its mandate of proving the offence of murder against the 1st accused person beyond reasonable doubt. The same cannot be said about the 2nd accused as shown in this judgment. I therefore arrive at a finding that the 1st accused, Salome Wanjiku Kung'u, is guilty of murder as charged and I convict her accordingly. The 2nd accused is not guilty and I hereby enter an acquittal in his favour. The 2nd accused Tom Chege Mbithi alias Rasta is set free forthwith. He has been in custody for since 2014 and unless there is any lawful reason why he should remain in custody, I order that he be set at liberty forthwith. The 1st accused shall

remain in custody until sentence is pronounced. Orders shall issue accordingly.

Delivered, dated and signed this 25th day of October 2018.

S. N. Mutuku

Judge