



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL CASE (MURDER) NO. 45 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

JULIUS YAULA SINDANI.....1ST ACCUSED

JOEL MUSOKA VITIRO.....2ND ACCUSED

J U D G M E N T

1) The two Accused were jointly charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 8th day of September, 2015 at Kedong Ranch, Naivasha Sub-County within Nakuru County, they jointly murdered **Sameri Koitumet Kiragie**. They denied the charge and were represented by Mr. Kanyi.

2) The prosecution case was as follows. The deceased **Sameri Koitumet Kiragie** was aged 58 years old and was engaged in the business of making charcoal at Kedong Ranch. He resided there, among others engaged in the same trade. The dwellings were makeshift temporary shacks. The deceased's family lived at Nairegia Enkare in Narok. In addition to charcoal making, some of the dwellers at Kedong also brewed busaa and other such liquors for sale. One **Longuran** or **Nangura** alias **Turkana** was among those involved in the liquor trade.

3) On 8th September 2015 the deceased came by the house of the 1st Accused and invited **Esther Lenguya Napanu** to Nangura's to drink busaa. The deceased lived several hundred metres away. The 1st Accused was also present. He was a lover of **Esther Napanu Lenguya (PW1)** and lived with her in his house. Also present seated outside **Nangura's** was a guest the couple was hosting, the 2nd Accused.

4) In the course of consuming liquor, the revelers got drunk and an argument broke out between the deceased and the 1st Accused. The latter demanding to know the purpose of former visit. Soon a fight started. The deceased, described an old man was thrown to the ground. The 2nd Accused apparently tried to intervene but left and entered the house of **Longuran**.

5) For his part the 1st Accused having floored the deceased sat on his chest and continued to assault him in the ensuing struggle. Presently the 1st Accused pulled out a dagger and stabbed the deceased severally. The deceased became inert. On realizing what had happened, the 1st Accused shouted for Longura who came forth accompanied by the 2nd Accused. The three men carried away deceased towards Longura's shack. The three returned to the dwelling of 1st Accused later in the night and spent the night there. They ordered **PW1** not reveal what had happened.

6) Thereafter, the deceased was not seen alive again and presently his family, including his two sons **Simon Konana Sameri (PW3)** and **John Kaelo Sameri (PW4)** having got wind of their father's disappearance, travelled to Kedong in search of him on 12/9/2015. On inquiring, they received information concerning the fight at the house of the 1st Accused. They sought the 1st Accused out and interviewed him. The 1st Accused admitted a quarrel with the deceased but said he had left for home. He therefore did not know his whereabouts.

7) With members of the public **PW3** and **PW4** carried out searches, starting with the 1st Accused's home, without success. Close to the 1st Accused's home a grey cap Exhibit 4, identified as deceased's was found. The 1st Accused was compelled to accompany the search party to Maai Mahiu Police Station where a report of the disappearance was made. The search for the deceased resumed on 13/9/2015 with police in attendance but with no progress.

8) On 14/9/2015 the deceased's pair of shoes (Exhibit 5) were found buried in a hole. Close by the hole was Longura's shack. A shallow grave was spotted beside the shack and when dug out, revealed the deceased's half burnt body, wrapped in a gunny bag. The body bore several injuries. The dagger which **PW1** said was used in the fight was retrieved from the house of the 1st Accused by **CPL Justus Parsalat (PW6)** who also led police in removing the body.

9) **Dr. Titus Ngulungu (PW2)** conducted the post mortem examination on body of the deceased. Noting the multiple cuts and fractures to the body, he concluded that death was due to head and vascular injuries, due to combined blunt and sharp force trauma to head and neck. The two Accused were charged. **Longura** is said to have escaped and is still at large.

10) In an unsworn defence, the 1st Accused testified that he lived at Kedong and that the deceased also resided closely by. Both dealt in charcoal making. He stated that **PW1** was the wife of Longura who sold busaa. That on the material date the 1st Accused went for a drink of busaa at **Longura's**. That Longura and PW1 were serving revelers. He headed home at 5.00pm did not go out again. Neither did he see the deceased on the material date.

11) The 2nd Accused gave a sworn defence statement. To the effect that in the material period he had just moved into Kedong as labourer and started making charcoal. While at his work on 10/9/2015 he saw a group of people approach in the course of a search. They asked him to assist them search for a charcoal maker who had gone missing. They searched in vain, parting at the end of the day. A suspect was arrested. On the next day, the group returned and the search resumed. As they went on, a second search party summoned his group to the scene close to where the body was eventually to be found.

12) The second group was demanding who the 'luhya' man was. When he owned up he was assaulted. They demanded that he shows them where the deceased was. Then **PW1** who had also been assaulted was brought and she gave information where the body was, but nothing was found. Police arrived and rescued both from the mob. They were placed in a hut under arrest. Later they were taken out to the police motor vehicle which bore a corpse. The 2nd Accused denied committing the offence and said he did not know the 1st Accused or **Longura** or participate in disposing of the body of the deceased.

13) At the close of defence, submissions were made by Mr. Kanyi on behalf of the Accused persons. Having reviewed the prosecution and defence case, there is no dispute that the deceased and the two Accused as well as **PW1** were living at Kedong Ranch in the material period. The deceased also lived there. Their primary occupation was charcoal making. Also alcohol was brewed by some of the dwellers who resided in makeshift shacks made out of sticks and polythene paper. There is no dispute that the body of the deceased was found in a shallow grave on 14/9/2015 close to the house of one **Longura**.

14) With regard to the shacks occupied by the deceased, the two Accused and one Nangura, there is no dispute that the same were placed in close proximity within the forest. The 1st Accused admitted imbibing busaa at the shack owned by **Longura aka Nangura**, the "**Turkana man**" on the afternoon of

the material date.

15) The court must determine whether with malice aforethought the two Accused jointly inflicted the injuries that led to the death of the deceased herein. The key witness for the prosecution was **PW1**. She testified that she lived with the 1st Accused as her lover and that in the material time, the 2nd Accused was staying with them as a guest. On the material date, from her testimony, the deceased came by the 1st Accused's house early in the afternoon and invited her to a drink of busaa at **Nangura's**. It appears that the 1st Accused was present when they got there, or he joined the revelers later. He says he left Nangura's at 5.00pm after a drink.

16) Whatever the case, **PW1's** testimony was that the revelers were seated outside Nangura's house within the view of their respective shacks close by. As the afternoon wore on, a squabble arose between the 1st Accused and the deceased the former demanding of the latter:

“What are you doing here?”

There followed prolonged arguments. The deceased who was seated tried to rise as the 1st Accused caught him by the scruff of the neck but the former fell down. The 1st Accused allegedly sat on the deceased pinning him down while hitting him. It seems that **PW1** retreated close to her hut as the 1st Accused had ordered her to stop screaming.

17) Presently, after some period of struggle, the 1st Accused pulled out his dagger (Exhibit 1) and stabbed the deceased severally. The 1st Accused, on realizing he was dead called to **Nangura** who came accompanied by the 2nd Accused. The three carried away the body. The night was setting in and the two Accused were gone until late in the night when they returned to the hut to sleep.

18) **PW1** was cross-examined at some length during her testimony. She did not waver. It would seem that the entire transaction began with the revelry early in the afternoon, ending with the quarrel and eventually fight that ended by night fall. This timing is confirmed by the evidence of the 1st Accused regarding his admitted presence at **Nangura's** prior to 5.00pm.

19) And although the 1st Accused claimed that **PW1** was **Nangura's** wife he confirmed he knew her well. He claimed that on the material date **PW1** and her husband **Nangura** were selling busaa to customers. This is confirmation that **PW1** saw him at the busaa party on the material afternoon. His claim to have left at 5.00pm and the relationship of **PW1** to **Nangura** were not put to **PW1** during her cross-examination.

20) **PW1** gave a lucid account of what transpired at **Nangura's** as the afternoon wore off. She stated that from her house she could see and hear what was happening outside **Nangura's** in relation to the fight. During cross-examination she said in part

“I took only one cup of busaa and went to work. Yes, 3 people were drinking busaa by 7.00pm. It was starting to be dark. Accused 1 fought with deceased at the house of Nangura. The house is not far from Nangura's – 100 metres. I was in my own house.....I came out but I was told by Mukwas (nickname for 1st Accused) to be quiet. I could see as darkness had not set in fully. 7.00pm is not very dark. Yes I lived with Mukwas. There was a fence close to the house. When fighting started I did not hear words as I was in the house. I could hear the arguments between them. Accused 1 talking very loudly – shouting. After the fight the deceased could not move – he never got up. He was lying down and could not speak. Nangura called to scene by “Mukwas” He shouted and Nangura came. Then the 3 men took body of deceased to the house of Nangura: Accused 1, Accused 2 and Nangura..... I followed secretly.

21) Despite this evidence on the relationship between **PW1** and himself, the 1st Accused did not during

cross-examination put to her that she was Longura's wife. **PW1** said that upon their return, the 1st and 2nd Accused warned her not to reveal what she knew and stayed close to her the next day to ensure she did not leave home. It is believable that because of her relationship with the 1st Accused, he was genuinely fearful to report to anyone until questioned by police.

22) While part of the transaction in this case occurred at night, it had started in daytime among people who were well known to each other. Therefore while **PW1** was in some respects a sole eye witness regarding the early night part of it, the circumstances are such that she was able to identify the actors, and their roles, from beginning to end. Earlier she saw them in the day light and later could identify the voice of the 1st Accused. The latter no doubt, because she knew him well out of living with him. Secondly, the incident in question took hours.

23) Regarding identification by voice the Court of appeal said in **Choge -Vs- Republic [1955] IKLR** stated that:-

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused's voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

24) **PW1's** evidence is in part supported by some of the 1st Accused admissions, but also by the son of the deceased who led the search for him. This is **PW4**. He stated in his evidence that following information he obtained in the course of the search, he confronted the 1st Accused on 12/9/2015 at Kedong. He stated:

“.....we interviewed him (1st Accused) concerning my father. Julius said that he pushed the deceased to go home after quarreling on the evening he disappeared. That they were drinking at house of Julius. Julius persisted that he did not know where deceased went thereafter.”

25) By this time police had not come into the matter as no report had been made. Indeed it was at the end of the search on 12/9/2012 that **PW4** took the 1st Accused to the Maai Mahiu Polce station to make a report. **PW4** who visited Accused's 1 house estimated the distance between it and Longura's at 50 metres. He described the “fences” around the huts as shrubbery, also visible in the exhibited scene photos Exhibit 2A-J. His evidence was that the cap and shoes of the deceased were recovered within close range of the house of the 1st Accused. His evidence regarding the 1st Accused's admission was not objected to or challenged in cross-examination.

26) In my considered view, the said admissions and the findings related by **PW4** support the evidence of **PW1**. The undisputed findings of the deceased's cap and shoes as well as body was within radius of the scene where the revelry and fighting occurred. Regarding admissions of the nature made to **PW4** by the 1st Accused, the Court of Appeal in the case of **Sango Mohamed Sango & another -Vs- Republic [2015] eKLR** that such evidence did not amount to a confession and was admissible against the maker. The relevant passages are quoted in *extenso* below:-

“The next issue is the propriety of the admission into evidence and reliance upon the confessions by the appellants. Section 25 of the Evidence Act defines a confession thus:

“25. A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.”

Broad as section 25 appears to be, a confession must still be sufficiently clear that the accused

person admits all the elements of the offence charged. As the former Court of Appeal for Eastern Africa stated in REX V. KITUYAN S/O SWANDETTI (1941) 8 EACA 56, a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.....

The appellants contend that confessions to private citizens are not admissible because under section 25 of the Evidence Act confessions as a general rule are not admissible. They contend further that section 26 of the Evidence Act must be read together with section 25. In our view, that contention is not correct, and subject to the normal safeguards, a confession to a private citizen is admissible and may be proved in evidence against an accused person. The same argument was presented and rejected by this Court in MARY WANJIKU GITONGA V. REPUBLIC, CR. APP. NO. 83 OF 2007. The appellant in that appeal was charged with the murder of her husband. The High Court admitted in evidence a confession made by the appellant to her brother regarding the killing of the deceased. On appeal the admission of the confession was challenged. This Court held firstly that the statement was admissible under section 63 of the Evidence Act as direct evidence of what the witness had heard and secondly that to treat such statements as inadmissible “*would be enlarging the provisions of section 25A (of the Evidence Act) beyond reasonable limits.*” The Court concluded:

“It was agreed that it was the appellant herself who went to Titus in Nairobi and told Titus what had happened between her and the deceased. Titus, we have held, was not a person in authority over the appellant and the evidence of Titus could not be held to be inadmissible on that basis. The evidence could be disbelieved and rejected but it was admissible.”

Earlier, in PARVIN SINGH DHALAY V. REPUBLIC, *supra*, the court accepted on principle that a confession can be made to a private citizen and noted that in that appeal the confession in question was made to persons who were not in authority. It concluded thus:

“But a confession to criminality remains a confession whether it be made to a person in authority or to a private person and once the confession is repudiated or retracted or both repudiated and retracted, the confession requires corroboration unless the court is, for cogent and solid reasons, satisfied that the confession, though not corroborated, cannot be but true.” (Emphasis added).

(See also LAKHANI V. REPUBLIC [1962] EA 644, DEOKINANAN V. REGINAM [1968] 2 All ER 346 and FESTO ANDROA ASENUA & ANOTHER V. UGANDA, SC CR. APP. NO 1 OF 1998).

It is important to bear in mind that the amendments regarding confessions that were introduced to the Evidence Act by Act No 5 of 2003 and Act No 7 of 2007 were informed by the prevailing concern arising from consistent claims of use of torture *by the police* to extract confessions from suspects. The concern was never about confessions to private citizens. Thus for example, in EKAI V. REPUBLIC (1981) KLR 569 this Court sounded the concern in the following terms:

“Accusations of ill-treatment are often made against police officers, sometimes with justification. In fairness both to the police and to the accused person, we would like to suggest that consideration be given to amending the Evidence Act to provide that no statement in the nature of a confession made to a police officer of whatever rank be admissible in evidence against a person accused of a criminal offence. Such statements should only be admissible if made to a magistrate, no policeman being present and a carefully prescribed procedure should be followed by the magistrate including giving a formal charge and caution followed by questions as to whether the accused person has any complaints relating to his treatment or is suffering from any injuries and if apparent a note should be made of such injuries, and of any complaint which may be made.”

We do not see anything in the Evidence Act as amended that prohibits an accused person voluntarily making a confession to a private citizen. Indeed if the intention was to introduce a general prohibition of confessions even to private citizens as the appellant's claim, there would have been no need to retain the provision in section 26 of the Evidence Act which specifically prohibits confessions made to persons in authority.

Peter Murphy, in his book, A Practical Approach to Evidence, Blackstone Press, 2nd Edition, 1985, page 201, states as follows regarding confessions:

“A confession, like any other admission, may be made orally, in writing, by conduct or in any way from which a proper inference may be drawn adverse to the maker. Usually, confessions are made to police officers or other investigators as a result of interrogation, but may equally be made to the victim of an offence, a friend or relative or any other person.”

27) The admissions by the 1st Accused to **PW4** were not disputed at the trial as the said Accused only stated that he went home at 5.00pm. Similarly **PW1's** evidence is corroborated by the injuries described by **PW3** and the doctor at post mortem. The murder weapon, a dagger (Exhibit 1) was identified by **PW1** and produced as evidence. In his submissions, counsel for the Accused all but admitted that the evidence against the 1st Accused was overwhelming. However this is not a case where, as submitted by the defence, the Accused was the person last seen with the deceased alive. Rather it is a case where there is direct evidence of a sustained assault on the deceased by the 1st Accused and of subsequent attempts to conceal the murder by the burial of the body in a swallow grave and ultimately the silencing of the eye witness **PW1**.

28) That the 1st Accused had the presence of mind to do so negates any suggestion that he may have been too drunk to know what he was doing or that it was wrong. The sustained assault stabbing and severing of the deceased's neck evidences an intention on the part of the 1st Accused to cause him grievous harm if not death. From the events of the afternoon, it is possible that the 1st Accused was displeased with the interest the deceased was showing towards **PW1** by buying her a drink.

29) Reviewing all the available evidence, I am satisfied that the evidence against the 1st Accused is overwhelming. His defence cannot stand and must be taken for what it is – a mere denial. I therefore find that the prosecution has proved its case against the 1st Accused beyond reasonable doubt. I will convict him for the offence charged.

30) Regarding the 2nd Accused, **PW1** gave evidence that he was being hosted as a guest by the 1st Accused at his home in the material time. This in my view is consistent with his defence that he had been in Kedong for about 2 weeks at the time of the offence. **PW1** clearly stated that the 2nd Accused was not involved in the assault on the deceased, and that he attempted, albeit half heartedly to intervene before going into Longura's house. It is from this house that he was summoned by 1st Accused before he, and Longura assisted the said Accused in carrying away the body. According to **PW1**, the 2nd and the 1st Accused returned later in the night and warned her to keep quiet. Equally he and the 1st Accused hang around the home on the next day to ensure **PW1** did not leave.

31) While he claimed to be a stranger in the area and unfamiliar with the 1st Accused or **PW1**, the 2nd Accused did not challenge **PW1's** evidence to the contrary during cross-examination. And particularly, suggest to her that he had his own shack and was not a guest at the 1st Accused's home. Besides, if he first met **PW1** on the day of arrest, what reason did **PW1** have to implicate her in the disposal of the deceased's body? Although he claimed that he was on his own business when the search party first approached him on 10th or 12th September, he, without any compulsion spent two whole days with the party looking for a missing person that he did not know.

32) In my view, it is because he knew where the body was that his defence is specifically elaborate that the first day's search ended at the spot where the body was eventually found, and resumed, by agreement at the same spot the next day. **PW1**, according to **PW4** identified the 2nd Accused for arrest. It cannot be that the only reason the searching group eventually turned against a generous volunteer, on the second day, before the finding of the body is that they had found out that he was a 'luhya'.

33) The only reason I believe to explain the 2nd Accused's involvement in the search was guilty knowledge and subsequently fear, because his host had been arrested on the first day. Very possibly, his desire was to mislead the search team, and indeed for two days he was with them, he never revealed that he knew where the body was.

34) The 2nd Accused's defence was tailored to distance him from any relationship with and actions of the 1st Accused and sounded rather contrived. He was vague even concerning the location of his alleged shack, relative to the home of the 1st Accused. **PW1's** evidence places the 2nd Accused at the scene of murder during the fight and subsequent to the murder. His defence does not stand up to scrutiny. While the 2nd Accused did not participate in the assault upon the deceased, I am satisfied that the evidence against him proves conduct consistent with the definition of an accessory after the fact.

35) Section 396 (1) of the Penal Code defines such accessory as follows:

“A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.”

36) The 2nd Accused as the 1st Accused's guest, assisted in the disposal of the body of the deceased, by carrying it from the murder scene and subsequently must have taken part in digging the shallow grave at Longura's place. The body torso was dressed in a gunny bag and had burns following apparent attempts to disfigure the upper part by fire. It was buried in a shallow grave.

37) The 2nd Accused returned with the 1st Accused to his home late in the night, and warned **PW1** against revealing what had happened. The aim was clearly to conceal the offence and to assist the 1st Accused escape from an offence he knew had been committed by him. I do therefore find that the prosecution evidence establishes against the 2nd Accused a charge of Being an accessory after the fact of Murder Contrary to Section 222 of the Penal Code beyond any reasonable doubt. I do find him guilty and convict him for the said offence.

Delivered and signed in Naivasha this 24th day of **February, 2017.**

In the presence of:-

Mr. Koima for the DPP

Mr. Kanyi for the Accused

Accused – Present

CC – Barasa

C. MEOLI

JUGDE