



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NUMBER 4 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DAVID NGARUIYA KINJANJUI.....ACCUSED

JUDGEMENT

David Ngaruiya Kinyanjui, hereinafter called “the accused” is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is stated in the particulars of the offence that on the 23rd day of December 2013 at around 1.30am at Kihingo Village within Kiambu County the accused murdered Francis Kariuki Kinyanjui, hereinafter called “the deceased”. The accused pleaded not guilty to the charge. He is represented by Mr. Solomon Wamwayi, advocate.

In support of the prosecution case, thirteen (12) witnesses testified. In brief their evidence shows that the accused and the deceased were brothers. At the time of his death the deceased was sharing his house with the deceased. On 22nd December 2013 the deceased, the accused, Richard Kungu, PW5 (Richard), and John Kige Kihara, PW4, (John) spent the day together mostly drinking alcohol. That evening the deceased had supper with the family of Hannah Njeri, PW7 (Hannah). After eating, the deceased asked for a hammer from Hannah and explained that he needed to use it to break open the door to his house because he did not have the key. The accused was said to have left with the key. Hannah gave him the hammer. The deceased asked Richard to accompany him to his house and assist him. They broke open the door and the deceased gained entry into the house. Richard left. The following day, the village woke up to the shocking news of deceased’s death.

Evidence further shows that early in the morning of 23rd December 2013 at around midnight, the accused woke up Henry Ikonya, PW3 (Henry), a neighbour, and asked for help. The accused was crying at the time. He told Henry that he had gone home and found their house broken open and his brother, the deceased, dead. Henry told the court that he did not believe the accused. Henry tried to call Josphat Kihara Kinyanjui, PW1 (Josphat), the brother of the deceased and the accused to inform him but he did not go through. The matter was reported to the area Chief and the police.

When the police visited the scene on 23rd December 2013 they found the body of the deceased lying on the left side of the sitting room. A piece of timber, with blood stains on it, was found leaning on the wall inside the house. A blood-stained *panga* was also found lying next to the body. The scene was photographed and the body removed and taken to Kiambu Level Five Hospital Mortuary. Samples of blood obtained from Josphat, Paul and Mary Gitau, brothers and sister respectively to the deceased, confirmed that the blood stains found on the piece of wood and *panga* belonged to a biological sibling of the three.

Dr. Paul Mbalu examined the body of the deceased on 30th December 2013. He found bruises at the back of the trunk; deep cut above the left eye measuring 4cm long with a fracture of the underlying bone; a stab wound above the mouth measuring 2cm long with a fractured underlying bone; a cut on the nasal bridge with fractured underlying bone and bleeding on the brain tissue. The doctor concluded that the cause of death was due to head injury due to blunt and sharp force trauma.

In his defence given unsworn, the accused told the court that he spent the day with his brother the deceased, their cousin John Kinge, and Richard Kungu. They bought alcohol and took it. He said that he left to go to Kiambu town in the afternoon and stayed away until 10.00pm when he returned home. He said that he found the door to their house broken, entered the house and started calling his brother the deceased; that the deceased did not answer; that he put on the lights and saw a piece of timber on the ground; that he picked it and placed it against the wall; that he found the deceased lying on the ground facing up with injuries on the face. He testified that he rushed to call Henry. Both went to inform Alice Wambui Ngaruiya, PW8 (Alice), who advised them to wait until the following morning. He said that he was arrested with Josphat but the latter was released and he was charged with this offence.

At the close of the defence, Mr. Wamwayi submitted that the case for the prosecution is based on circumstantial evidence and that the prosecution must prove that the evidence irresistibly points to the accused to the exclusion of all others. Mr. Wamwayi took issue with the contradictions in the evidence of Celina Mbaire, PW2 (Celina) and that of the Investigating Officer SGT Peter Indeché, PW12, (SGT Indeché). He submitted that Celina testified to hearing the deceased shouting “*unataka kuniua*” but she did not go to deceased’s house to find out and that she did not hear the voice of the person being addressed nor did she hear the deceased call the name of that person. Counsel submitted that the evidence of SGT Indeché is that he was told by Celina that she heard the deceased utter the words “why do you always wake me up late as if I am your wife.”

Counsel submitted that the court should examine the behaviour of the accused after finding the deceased dead; that he reported the matter to Henry and at the time of informing Henry the accused was crying; that Henry did not notice any bloodstains on accused’s clothes and that the accused reported the incident to Alice. In both occasions, it was submitted, the accused narrated how he went home, found the door to their house broken and deceased killed. It was further submitted that the panga and the piece of timber were not dusted for fingerprints and that the blood samples were not taken from the accused and therefore there is nothing to link the accused with the blood found on the panga and piece of wood. Counsel submitted that the prosecution relied heavily on suspicion and that suspicion however strong cannot substitute evidence. Counsel urged the court to find that the prosecution has failed to prove this case beyond reasonable doubt and asked the court to acquit him.

On the other hand the prosecution submitted that it had proved the case beyond reasonable doubt by strong circumstantial evidence; that there is evidence to prove that the accused and the deceased used to quarrel often due to accused’s behaviour of coming home drunk and late and asking the deceased to open for him; that on the night of murder the deceased has asked why the person always comes home at night. Counsel submitted that the deceased was addressing the accused because he is the only person who used to come home late. Counsel submitted that the accused was angered by the broken door and he attacked the deceased because of this.

The offence of murder is committed when a person with malice aforethought causes the death of another person by unlawful act or omission. The onus of proving murder lies with the prosecution. The accused person enjoys the right to remain silent and can even choose to say nothing during his trial. His silence is never interpreted as an admission of guilt. The prosecution must prove the guilty act (*actus reus*) and the guilty mind (*mens rea*). The latter is the intention to cause the death or to do grievous harm to the victim. Section 206 of the Penal Code has defined malice aforethought into four (4) categories:

(i) 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;

(ii) knowledge that the act or omission causing death will probably cause the death of 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;

(iii) an intent to commit a felony;

(iv) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.

Proof of any one of the four is sufficient to constitute murder.

In this case, there is no dispute that the accused and the deceased were brothers and lived together in a house described by witnesses as belonging to the deceased. It is therefore correct to say that the accused was being accommodated by the deceased. There is also no dispute that the deceased was Hannah's boyfriend. In fact Hannah described him as her husband. They have sired one child L. G together. We were not told how old L. G but it is prudent to use initials to protect her in case she is a minor. On the day in question 22nd December 2013 the accused and the deceased spent the better part of the day at the deceased's home with Richard and John. The accused left in the afternoon of that day to go to Kiambu town. He is said to have taken the key to their house with him. In the meantime, the deceased went to have supper with the family of Hannah. He left at about 9.00pm. Before leaving he asked Hannah to give him a hammer to break open the door to his house because he did not have the key. Hannah gave him a hammer. Evidence is not clear whether he went directly to his house or he went to the shop of his brother Josphat to buy cigarettes. But whatever the sequence of events was, he finally ended home and with the help of Richard, he removed the hinges and the locking lever of his house. He gained entry. Richard said he left him after opening the door. There is no other direct evidence as to what happened after Richard left.

In the course of that night at about 11.00pm, Celina who was a close neighbour of the deceased heard the deceased ask "*unataka kuniua*". According to Celina, this was repeated three times. There was no answer and Celina did not know who was being addressed. This evidence as submitted by the defence counsel contradicts what SGT Indeche told the court. According to him, Celina told him that the deceased address the un known person thus: "*why do you always wake me up late as though I am your wife*". In both occasions, the person being addressed is not disclosed.

Henry was woken up at about 12.30am by the accused. The accused was crying. He told Henry that he had arrived home and found the door to their house broken open; that he entered and called his brother the deceased without receiving an answer; that he put on the light, saw a piece of timber on the ground, picked it and place against a wall; that he looked for his brother in the bedroom, failed to find him but found him in the table room at a corner and that the deceased was lying on the ground with injuries to the face. In company of Henry they tried to wake Henry's mother Celina without success. They went to the home of Alice and woke her up. The accused repeated the same story about what he had found to Alice. Alice advised them to sleep until the following morning.

SGT Indeche completed his investigations and formed the opinion that the accused had murdered his brother because his time from the time he left Kiambu at 9.30pm, to when Celina heard the deceased utter the words stated above at 11.00pm to the time the accused woke up Henry was not accounted for. SGT Indeche also told the court that evidence from witnesses pointed to the accused as the one who had committed the offence.

Circumstantial evidence is defined by the Black's Law Dictionary 9th Edition circumstantial evidence is defines as: (a) "***Evidence based on inference and not on personal knowledge or observation***" and (b) "***All evidence that is not given by eye witness testimony.***" In order to secure a conviction where a case for the prosecution relies on circumstantial evidence, the prosecution must discharge the onus of proving the following circumstances beyond reasonable doubt:

(i) The circumstances from which an inference of guilt is sought to be drawn must be cogently

and firmly established;

(ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

(iv) 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.

See Musili Tulo v Republic [2014] eKLR; GMI v Republic [2013] eKLR; R. v. Kipkering Arap Koske & Another, 16 EACA 135 and Musoke v. R [1958] EA 715 on circumstantial evidence.

Does the evidence in this case meet the above criteria? My considered view is that I do not think so. The evidence establishes that the accused was away. There is no evidence to show when he arrived home except what he stated in his unsworn defence and what Henry testified to. Evidence does not point to him as the person being addressed by the deceased. I have examined the evidence of Celina. She did not tell the court, both in evidence in chief and in cross-examination that she heard the deceased ask the question “*why do you always wake me up late as though I am your wife.*” If indeed the deceased stated this and Celina heard those words, why did she not tell the court so? Why would she tell the court she heard “*unataka kuniua*” and DGT Indeche a different version? To my mind the contradicting versions can only mean one thing that either Celina was lying to the court or SGT Indeche was not telling the truth as to what Celina told him. But even if this court were to believe that both versions are correct, there is no evidence to show that the deceased was addressing the accused.

I am aware that the prosecution wants this court to believe that because the accused and the deceased often quarreled, it must have been him who murdered his brother.

The deceased's body was found in the table room at a corner. A panga was found beside the body and a piece of timber was also found placed leaning on the wall. The accused said he is the one who placed it there after finding it lying on the floor. These are probably the weapons that were used to inflict injuries on the deceased. The sharp and blunt force trauma are consistent with injuries inflicted using these two weapons.

The circumstances surrounding the death of the deceased are not cogently and firmly established to enable this court to draw an inference of guilt on the part of the accused. These circumstances are not of a definite tendency unerringly pointing towards the guilt of the accused; taken cumulatively, these circumstances do not 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 and finally this court finds other co-existing circumstances which would weaken or destroy the inference. For instance the door of the deceased's house was open after he had broken it to gain access. There were other people he had interacted with that evening including Henry, Richard and even his other brother Josphat. Any of them or any other neighbour are not excluded from having committed this offence.

There is also the issue of motive. The prosecution submitted that the accused was annoyed by broken door. This is not in evidence. This court cannot presume that the deceased was addressing the accused. It is worth noting that the deceased was not killed in his bed. His body was found in the living room. It is not in evidence why he was in the living room at that late hour. Motive is not an ingredient for murder. However it becomes relevant in a case based on circumstantial evidence. In Libambula -Vs- Republic (2003) KLR 683 the Court of Appeal stated that motive becomes an important element in the chain of presumptive proof where the case rests on purely circumstantial evidence.

My careful analysis of the evidence in this case leaves me with doubts as to the involvement of the

accused in the murder of the deceased. The accused may be a person of bad character, quarrelsome, easily excitable and one who used to pick fights easily as testified by his older brother Josphat. He may have been in police custody for what offence he may have committed. This court cannot take this against him because all the evidence against him points to suspicion that he may have murdered the deceased. As it has been stated in decided authorities, suspicion alone, no matter how strong can never be a basis for conviction. To prove a case beyond reasonable doubt is a heavy burden. In this case it has not been discharged and the benefit of doubt must go to the accused. If he is the one who killed his brother, he will have to wait to record with his maker and will pay for it on the judgement day. I find the offence has not been proved and consequently enter acquittal against the accused person. He is free to go home and enjoy his freedom unless for any lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 30th day of May 2017.

S. N. MUTUKU

JUDGE