



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 115 OF 2014

REPUBLIC..... PROSECUTOR

-VERSUS-

S C B.....ACCUSED

JUDGMENT

1. **S C B**, the accused person herein, was charged with the murder of his father one **C B N** (hereinafter referred to as '**the deceased**') before this Court on 10/12/2014. The particulars of the information were that: -

“On the 3rd day of December 2014 at [particulars withheld] in Kuria East District within Migori County in the Republic of Kenya murdered C B N.”

2. The accused person denied committing the offence and the case was set for hearing. A total of eleven witnesses testified in support of the information facing the accused person. **PW1** was a wife to the deceased. She was one **S M B**. **PW2** was **JERI SOPHIE** a neighbour to the deceased. **PW3** was **I N**, a son to the deceased as well as **J N B** who testified as **PW4**. Another neighbour to the deceased called **JOHNES MARWA NYANGI** testified as **PW5**. A son-in-law to the deceased testified as **PW7**. He was one **N J M**. **No. 226557 AP Corp. ZACHARY OWINO** testified as **PW8**. Another son to the deceased called **B M D** testified as **PW9** and **Dr. VITALIS K’OGUTU** who conducted the post mortem examination on the body of the deceased testified as **PW10**. The investigating officer **No. 81670 Cpl. HELEN KOECH** attached to the DCIO offices in Kuria East District testified as **PW11**. For the purposes of this judgment I will refer to the said witnesses according to the sequence in numbers in which they testified.

3. The prosecution's case was based on circumstantial evidence for the reason that there was no eye-witness account on how the deceased met his death. For this reason I will revisit the evidence of the witnesses.

4. **PW1** testified that she used to live with the deceased as the second wife. That the deceased left home on 03/12/2014 at around 04:00pm to the nearest Senta Trading Centre but did not return. **PW1** prepared supper and ate with her two sons, the accused person and **PW3** and went to sleep at around 08:00pm. The accused person and **PW3** slept together in one house and **PW1** slept in another house. **PW1** left for a circumcision ceremony early the following morning and instructed the accused person and **PW3** to graze their cows. **PW1** was later on called by one of her neighbours and informed that her husband, the deceased, had been found dead. She immediately proceeded to the scene and confirmed the information. She witnessed the police collecting the body of the deceased to the mortuary. **PW1** however did not see the accused person at the scene and she later learnt that the accused person had been arrested at Kegonga town. She testified that the accused person related so well with the deceased.

5. PW2 testified that the deceased had gone to her home on 03/12/2014 at around 06:00pm looking for one **Mwalimu Chacha** (not a witness) and left at around 07:30pm as it was getting late and the said Mwalimu Chacha was yet to appear. She only learnt of the the death of the deceased the following day at around 10:00am.
6. PW3 who was aged 15 years old at the time of testifying in Court told this Court that he was the second born to his mother PW1 whereas the accused person was the first born. That in the night of 03/12/2014 he had slept with the accused person in their house at their home until the following morning. As PW1 left for a ceremony, the accused person and him were instructed to take the cows for grazing. They complied and the accused person was ahead as PW3 followed behind with the cows in-between. The accused person did not carry anything that morning. When they reached a certain hill, as the the accused person was way ahead he yelled and called PW3. On rushing there, the accused person showed PW3 a blood trail and told PW3 that the deceased was lying dead in the hill. The accused person was asking who had killed the deceased. PW3 did not see the deceased then. The accused person then sent PW3 to go and inform their immediate neighbour one **Mwita Marwa** (not a witness) who was also their relative. PW3 rushed there and when he returned to the scene he raised alarm and people gathered. PW3 only saw his father, the deceased, at the burial. PW3 did not know where, how and when the accused person was arrested. PW3 saw police officers at the scene who later went and searched the house he lived with the accused person. During that time, the accused person was not there. PW3 also saw the police take away a file used for sharpening tools from the their house. He also identified a phone which was bought by PW9 for the deceased.
7. PW4 only learnt of the death of his father, the deceased, in the morning of 04/12/2014 as when he had visited his other brother, **C B** (not a witness). He rushed to the scene and confirmed that the deceased had indeed been killed. He observed the body carefully and noted several cuts on the head. He described what he saw at the scene as horrifying. He then rushed to Nyamtiro Police Post and reported the matter only to learn that the Area Chief had already done so. As he headed to the scene with the police he was called and informed that the accused person, who was suspected to be behind the death of the deceased, had been arrested at Kegonga town and taken to the Kegonga Administration Police Camp. PW4 witnessed the police take photographs at the scene which he identified in Court. He equally witnessed the police collect the body of the deceased which was taken to Pastor Machage Memorial Hospital Mortuary for preservation and also search several houses at the homestead of the deceased including the house of the accused person. He also identified a phone which was bought by PW9 for the deceased.
8. PW5 confirmed meeting the deceased on 03/12/2014 at around 07:30pm in homestead of PW2 as he was returning to his home from Senta Trading Centre. He left the deceased there in the company of two people **Thomas Mabire** and **Jeris Sobe**. He learnt of the death of the deceased later. PW6 also confirmed seeing the deceased at the homestead of PW2 where he had gone to partake the local alcohol. He arrived at 05:00pm and shortly the deceased walked in alone. Later PW5 also walked in. They were all drinking. PW5 was the first one to leave and then the deceased followed as PW6 was the last to leave at around 08:00pm. PW6 neither met the deceased nor PW5 that night and he only learnt of the death of the deceased the following morning. He rushed to the scene and so confirmed. He only looked at the body of the deceased from a distance.
9. PW7 identified the body of the deceased for purposes of conducting the post-mortem examination. The examination was carried out by PW10 who confirmed 9 deep cut wounds on the back of the neck, right and left cheeks. The jaw bone was also fractured and the spinal cord was cut at the neck. He opined that the cause of the death of the deceased was the cut spinal cord secondary to assault by a sharp object. He filled in a Post Mortem Report which he produced as an exhibit.
10. PW8 was the arresting officer who was at the Kegonga AP Camp in the morning of 04/12/2014 when members of the public brought the accused person on allegations that he had killed his father. PW8 searched the accused person and recovered a phone from one of the pockets of the trousers the accused person put on. He identified the same in Court. He later handed over the accused person to the police from Ntamaru Police Station.

11. PW9, a Nurse Aid, was called in the morning of 04/12/2014 and told that his father, the deceased, had been injured by the accused person. He took his mother and sister and headed to his father's homestead. He then proceeded to the scene and found the lifeless body of his father. He observed several cuts on the neck and all over the head. He then called the Area Chief who was already aware. When the Chief arrived at the scene and after learning that the accused person was suspected to be the one who had killed the deceased, he managed to get the contacts of the relatives of the deceased who lived in Kegonga town and asked them to arrest the accused person in the event he surfaces there. PW9 learnt of the arrest of the accused person at Kegonga town later that morning. He also saw the police take photographs at the scene which he identified in Court. He also witnessed the police conduct searches in the houses at the homestead of the deceased and recover a sharpener from the house of the accused person. The body was taken to Pastor Machage Memorial Hospital mortuary for preservation where he identified the body of the deceased with PW7 before the post-mortem examination was conducted. PW9 identified the phone he had bought for the deceased and stated that the deceased related so well with all his children. He however stated that the accused person was a known thief and had even been imprisoned before and that the deceased was very strict with him.

12. PW11 who testified as the investigating officer was not the initial investigator. She had taken over the matter from one Sgt. Tanui who had retired from the service. It was Sgt. Tanui who visited the scene and had the photographs taken. PW11 however recorded statements from some witnesses in the course of the investigations and confirmed that she had on 07/12/2014 accompanied the initial investigator for the post-mortem examination. On 08/12/2014 she escorted the accused person to Kehancha District Hospital where the accused person was examined and certified mentally fit to stand trial and his age assessed at 19 years old as he had earlier on alleged to be a minor. She then preferred the charge against the accused person.

13. PW11 carefully reiterated the evidence of the witnesses. She produced a Statement under Inquiry dated 07/12/2014 by the accused person wherein the accused person had admitted having taken the phone belonging to the deceased after he found him dead with the aim of calling and informing his relatives of what had happened. Also produced were the photographs, the phone, investigation file, the Mental Assessment Report and the Age Assessment Report as exhibits.

14. At the close of the prosecution's case, the accused person was placed on his defence and opted to give sworn testimony. The accused person reiterated that he was the one who found the body of the deceased and informed PW3 about it. As he asked PW3 to run and call one of their neighbours, the accused person picked a phone which he knew belonged to the deceased from the scene with the aim of calling and informing his people about the death. He then rushed to Kegonga Police Station to report the matter. When he reached Kegonga town, he was confronted by members of public that he was escaping having killed his father. He was arrested and taken to the Kegonga AP Camp and later on taken to Ntimaru Police Station where he was eventually availed before Court and charged. He denied the information and alleged that he was only being suspected of committing the offence which he knew nothing about. The accused person closed his case without calling any witness.

15. At the close of the defence case, Learned Counsel for the accused person left the matter for judgment. The prosecution relied on the evidence as tendered on the record.

16. It is now on the basis of the foregone circumstantial evidence that this Court is called upon to decide on whether or not the accused person is guilty of the offence of murder.

17. This Court is called upon to closely examine the evidence on record, not only as its normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

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

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

18. The foregone principles were set out in the *locus classicus* case of ***R -vs- Kipkering arap Koske & Another (supra)*** and have repeatedly been used in subsequent cases including the Court of Appeal cases of ***GMI -vs- Republic (2013) eKLR, Musii Tulo vs. Republic (2014) eKLR*** among many others.

19. The Court of Appeal in the case of ***Musii Tulo (supra)*** in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA 715 citing with approval Teper v. R (1952) AL 480 thus:-

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

20. The chain of events leading to the arrest and arraignment of the accused person before this Court came from the eleven witnesses whose evidence is reiterated above. It is not disputed that the deceased left his home on 03/12/2014 and did not return until when he was found dead on 04/12/2014. The deceased was seen alive in the evening of 03/12/2014 by several people including PW2, PW5 and PW6. That was at the homestead of PW2 where he had gone to take some alcohol. He then left alone at around 07:30pm and did not return. No one else saw the deceased that night. According to PW1 and PW3, the accused person spent that evening and night at home. He even went in and slept in the same house with PW3. When PW3 testified he did not indicate whether the accused person left the house at anytime that night but confirmed that the accused person was still inside the house in the morning. PW1 talked to both the accused person and PW3 before she left in the morning and instructed them to take the cows for grazing. They obliged. As they left with the cows to the hills for grazing, PW3 confirmed that the accused person did not carry any tool or weapon. It is also not in dispute that the accused person was the one who was way ahead of the cows and PW3 and discovered the body of the deceased. He called PW3 and sent him to their neighbour who was also their relative. PW3 did not see the body of the deceased at anytime until during the burial.

21. There is also the issue of the phone. The accused person admitted that he is the one who took the phone from where the deceased lay dead. He wanted to use it to call their relatives and inform them about the death. He also stated that since he had sent PW3 to inform their relative he decided to rush and report the matter to the police at Kegonga but he was arrested before at Kegonga town before making the report. That was not long after he had discovered the body of the deceased.

22. When the events are looked into intently, there seem to be no link whatsoever between the death of the deceased and the accused person. It is not clear how it came to be known that the accused person was the one who had killed the deceased. All the witnesses who testified along that line of evidence indicated that they only heard people saying so. It appears that the phone is what made the accused person be linked with the commission of the offence. The accused person did not deny being in possession of the phone. He clearly stated where he got it and why he took it. That was a reasonable explanation in the circumstances. The accused person as well explained why he had left the scene and went to Kegonga. He went to report the matter to the police. There is no evidence that the accused person intentionally failed to report the matter to the police at Kegonga or that he had passed the station at Kegonga and was heading elsewhere or that he was aware of any police station nearer than Kegonga but without any reasons decided not to report the matter there. Therefore, his explanation as to why he was at Kegonga a short moment after discovering the body of the deceased is equally reasonable in the circumstances.

23. On evaluation of the evidence, I find that the circumstantial evidence relied upon in this case does

not meet the required legal standard. There are several glaring gaps in the evidence that makes any reliance on the circumstantial evidence legally wanting. What remains is but mere suspicion since word had long gone round that the accused person was the one who had killed the deceased. That was even before the accused person was arrested and it is of course that suspicion that led to the Chief to ask the relatives of the deceased at Kegonga to hunt for and arrest the accused person. No conviction can be based on suspicion however strong. The Court of Appeal in the case of **James Tinega Omwenga v. Republic (2014) eKLR** clearly stated that: -

“20. Based on the evidence on record, we find that the only thing that connects the appellant to the offence is suspicion.....”

It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic -Criminal Appeal No. 17 of 1998, the court held,

'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'

See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.”

24. Having failed to prove that it is the accused person who caused the death of the deceased by an unlawful act, there is no point of dealing with the third ingredient as that will not serve any purpose at all.

25. It is now the finding of this Court that the prosecution has failed to establish the ingredients of the offence of murder as required in law. I now come to the conclusion that the information of murder facing the accused person has not been proved. The accused person, **S C B**, is hereby found **NOT GUILTY** of the murder of his father **C B N** and he is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 29th day of June 2017

A. C. MRIMA

JUDGE