



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CRIMINAL CASE (MURDER) NO. 35 OF 2016**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**PAUL MBUGUA KAMAU alias KAIRIA.....ACCUSED**

**J U D G M E N T**

- 1) The Accused was charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars states that on the night of 5<sup>th</sup> and 6<sup>th</sup> October, 2016 at Wanjohi trading centre within Miharati sub-county in Nyandarua County, he, jointly with others not before court murdered **Julius Ngugi Kimani**. He denied the charge and was represented by Mr. Marube
- 2) On the morning of 6<sup>th</sup> October, 2017 the body of the deceased, a resident of Miharati, was found dumped at a place referred to as Wanjohi river junction. It bore head injuries with evidence of strangulation, and was naked save for underwear.
- 3) In attempting to resolve the crime, the investigating officers traced the last movements of the deceased prior to his death. It emerged from several bar attendants, and other persons including **Mary Muthoni Karanja (PW4)** and **Mary Wanjiku Wangari (PW5)** that the deceased had spent the previous night at Wanjohi trading centre on a drinking spree, shuttling between several bars at the centre. His final call was at **Happy Valley bar**, where he purchased Cane beer but did not enter the bar as it had closed down for the night. He then left the bar aboard a motor cycle (*boda boda*) operated by the Accused, also well-known at Wanjohi trading centre.
- 4) One witness who claimed to have visited **Happy Valley Bar, Shem Mwangi Gitau (PW2)** in the company of (PW5) had also been ferried there by the Accused. He (PW2) too claimed that the Accused had robbed him of his cash while taking him away from Happy Valley to Wanjohi Centre on the same night. That is the gist of the prosecution case.
- 5) In his sworn defence statement the Accused stated that he operated a *boda boda* business at Wanjohi center in the material period. That on the night in question, the deceased approached him requesting to be ferried to **Happy Valley bar** and as the bar was closing when they arrived, the deceased bought take away Cane beer and requested to be dropped back at Wanjohi centre, 2 kilometres from **Happy Valley**. He did so at about 11.00pm. He said that he did not murder the deceased and could not tell what happened to him after he parted with him at Wanjohi centre. He said he ferried many customers on the material night apart from the deceased. He was arrested in town on the next day while at the centre.
- 6) The court having considered the evidence on record and defence submissions finds no dispute in respect of several facts. The Accused was known to the deceased and on the material night he drove the deceased on his motor cycle to **Happy Valley Bar**, from Wanjohi centre where the deceased had been drinking. After he purchased Cane beer, the deceased was again transported by the Accused to Wanjohi centre. That Wanjohi is some distance away from Happy Valley. That the deceased's half naked body was found at Wanjohi River junction on the next morning. The cause of death is not in dispute.
- 7) As the defence counsel has rightly submitted, there is no direct evidence linking the Accused to the murder of the deceased, and the court must determine whether the circumstantial evidence herein meets the threshold set out in **Kipkering Arap Koskei -Vs- Republic [1949] 16EACA 135** and in **Simoni Musoke -Vs- Uganda (1958) EA 715**.
- 8) The Court of Appeal observed in the former case that:-

**“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”**

And in **Simoni Musoke -Vs- Uganda (1958) EA 715**, where quoting from the case of **Teper -Vs- Regina [1952] 2 ALLER 447** the court further stated the principle that:-

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

9) First of all, the value of the supposed similar fact evidence adduced through **Shem Mwangi Gitu (PW2)** and the witness’s credibility were dented by two factors. That despite claiming to have been almost strangled by the Accused in a robbery bid on the same night, **PW2** did not report directly to police or seem keen to pursue the matter. Secondly, the Occurrence Book record of his alleged complaint at the local police post on the day after was not produced, nor did the officer he reported to, give evidence.

10) As for evidence by **Joseph Wanderi Kimani (PW3)**, a brother to the deceased, claims made during cross-examination that he had spotted the Accused’s motor cycle parked by the Wanjohi River at 3.00am on the material night appeared to be an afterthought. These claims were not stated in **PW3’s** evidence-in-chief or initial statement to police. They were first raised in a further police statement and during cross-examination during the trial. Besides, if **Robert Kiragu Kariuki (PW8)** is believed, by 2.30am the Accused had already parked his motor cycle for overnight security outside the hotel at Wanjohi centre where **PW8** worked as a guard.

11) It seems that **Miriam Wangari Macharia (PW7)** was loitering in the Wanjohi centre from bar to bar when she allegedly saw the Accused ferrying the deceased in the “wrong” direction at 10.30pm. Her evidence was muddled, even though it seemed the witness intended to suggest that at the said hour she noted that the Accused drove the deceased towards the junction (Wanjohi River) rather than towards his home. However, according to **PW4** the Accused and deceased got to Happy Valley “past 11.00pm or close to 1.00am”. The duo then left.

12) **PW5** and **PW2** then came to **Happy Valley** on the Accused’s motor cycle, according to the witness (**PW4**). They took their drinks at the veranda, and left. Is it believable that the Accused having murdered the deceased, returned to **Happy Valley** with **PW2** and **PW5** and remained there apparently unperturbed until he drove **PW5** home? And that at 2.30am he parked his motor cycle at **PW8’s** hotel veranda and again returned there early in the morning? And at what time did the Accused rob **PW2**?

13) The conduct aforesaid to my mind is inconsistent with that of one who had murdered the deceased and robbed **PW2**. Besides, where was the opportunity for committing these offences when it appears that the Accused was busy ferrying passengers all over, even by the prosecution’s account?

14) In my considered view, the admitted prosecution evidence that the Accused was the person last seen ferrying the deceased on motor cycle has been sufficiently answered by the Accused in his defence. The Accused was operating a transport business and had no duty to look out for the personal safety of customers once delivered at their destination.

15) Judging from witnesses’ accounts of the night life at Wanjohi centre on the material date, and the naked state of the deceased’s body when found, it may well be that he had ended up in the company of twilight women-cum bartenders such as **PW5** and **PW7** who seemed to swarm all over the centre. Nobody can tell how he sustained fatal injuries and how his body ended up at the Wanjohi River junction.

16) As for the Accused, it is my view that the entire prosecution case against him falls below the required standard of proof. I do therefore pronounce him not guilty and acquit him of the charges against him. He is set at liberty unless otherwise lawfully held.

**Delivered and signed in Naivasha this 20<sup>th</sup> day of December, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

Mr. Mburu for Mr. Marube for the Accused

Accused - present

Court Assistant – Barasa

**C. MEOLI**

**JUDGE**