



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 25 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

STEPHEN CHEGE NGOMO.....ACCUSED

JUDGMENT

1. Margaret Wako Toro was strangled on the night of 18th and 19th September 2007. She was an elderly lady of seventy three years. Tied around her neck was a piece of cloth; another was stuffed into her mouth. One of the small bones of her neck was fractured. The 5th and 6th right ribs were also broken. The pathologist formed the opinion that the cause of death was asphyxia due to manual strangulation.
2. There was no eye witness to the murder. The accused and two other persons were suspected of having a hand in the homicide. The Republic brought information charging Joseph Sankale Kamaro; Stephen Chege Ngomo; and, John Wanyoike Mungai with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars being that on the night of 18th and 19th September 2007 at Maili Nne area in Uasin Gishu District of the Rift Valley Province, they jointly murdered Margaret Wako Toro.
3. All the accused pleaded *not guilty*. On 9th July 2012, the Republic applied to terminate the proceedings against the 1st accused, Joseph Sankale Kamaro. The court (Mshila J) allowed the application. Fresh information was filed. After the close of the prosecution's case, the court found that the two remaining accused persons had a case to answer.
4. Before commencement of the defence case, the 2nd accused, John Wanyoike Mungai, jumped bail. The court issued a warrant of arrest. It was not executed. The court summoned Police Inspector George Jobando who undertook to arrest the 2nd accused or his surety. It never came to pass. The warrant of arrest remains in force. After a number of mentions; and, to secure the rights of the remaining suspect, the court directed that the files be separated. The current accused, Stephen Chege Ngomo, then proceeded with his defence.
5. The history of this case is also relevant. The trial opened on 22nd February 2010 before Mwilu J (as she then was). The learned judge heard the evidence of four witnesses. On 15th July 2014, I got seized of the matter. The amended information relating to the two accused was read afresh. The accused pleaded not guilty. I then explained to the accused their rights under section 200 (3) of the Criminal Procedure Code. They both elected to proceed from where my predecessor had left the matter; but they applied to recall PW4. I proceeded to record the evidence of the remaining five witnesses.
6. The Republic lined up nine witnesses. Joseph Kamau Toro (PW1) was a brother of the deceased. He testified that on 18th September 2007 at about 7.30 p.m., he received a call from the deceased. He was in Nairobi attending some Bible classes. The deceased was calling from her home in Maili

- Nne, Eldoret. At 8:00 p.m., he returned her call. The deceased told him that she had two visitors, Chege and Wanyoike (previously the 1st and 2nd accused). The deceased said that the two told her that someone named *Joseph* was planning to kill her. PW1 testified that *Joseph* was his nephew. PW1 asked to speak to Wanyoike. The deceased gave Wanyoike the phone. PW1 tried to enquire from Wanyoike the basis of the information he had given the deceased.
7. Later at 9 pm, PW1 called the deceased again. The two visitors were still there. He was concerned that the deceased had trusted the visitors. He sent her *airtime* of Kshs.500 the next morning at 8:00 a.m. Earlier that morning, at about 6:00 a.m., he telephoned Joseph's brother, Gichuhi. He told him what the deceased had said. Gichuhi promised to speak to Joseph. PW1 then tried to reach the deceased without success.
 8. PW1 later received a call from one of his nephews. The latter informed him that the deceased was murdered. PW1 travelled to Eldoret. The matter was reported to the police. Joseph was arrested. Upon cross-examination, PW1 conceded that he did not know Wanyoike or Chege. He said that the deceased and Joseph had quarreled previously. He testified that he had no doubt about the *Joseph* the deceased had spoken about.
 9. The body of the deceased was taken to Moi Teaching & Referral Hospital. PW1 identified the body for postmortem purposes. The autopsy was carried out on 20th September 2007 by Dr. Walter Nalianya (PW6). The body had congestion of the eyes. There was a bruise on right side of neck. There was vomit in the mouth. The pathologist found there was haematoma in the soft tissues of the neck. One of the small bones of the neck had a fracture. There were also fractures of the 5th and 6th right ribs; and, laceration of the right lung. He formed the opinion that the cause of death was asphyxia due to manual strangulation.
 10. PW2, David Ochieng, is a village elder. On 19th September 2007 he was at Maili Nne. A young boy told him that his aunt (the deceased) had been killed. PW2 went to the scene. The boy told him that Wanyoike "told the deceased that if the deceased did not give him [Wanyoike] some money he would kill her". On cross-examination, PW2 could not remember the name of the boy. PW2 knew Wanyoike. He started looking for him. He could not find him. The police arrested Wanyoike's mother. She was later released. On 12th June 2008, PW2, with assistance from the public, arrested Wanyoike and two other suspects at a plot in Maili Nne. The deceased used to live on that plot.
 11. PW7 was Police Constable John Ochongo. On 12th June 2008 he was instructed by the O.C.S to accompany him to Maili Nne. They re-arrested the three suspects. A village elder, David Ochieng (PW2), was present. The suspects were John Mungai; Stephen Chege Ngomo; and, John Wanyoike Mungai. They took the suspects to Baharini Police Station. C.I.D officers from Eldoret then picked up the suspects
 12. PW3 was John Ng'ang'a. He had employed Wanyoike between 2006 and 2007 as a farmhand in Naivasha. He fired him for being drunk. On 12th June 2008 the police visited PW3 in Naivasha. He accompanied them to Eldoret Police Station where he identified Wanyoike. That is when he learnt that Wanyoike had diverted out-going calls from the deceased's phone to PW3's number. PW3 had received a number of calls from persons who always hung up; and, who claimed that it was the wrong number.
 13. PW4 was Kamau Ndung'u. He testified that on 18th August 2007 at about 10:55 p.m., Wanyoike rang him. He said he wanted to talk to his father. PW4 could not remember Wanyoike's phone number. He told Wanyoike that his father had relocated to Naivasha. PW4 identified Wanyoike at the Police Station. On 17th September 2014, PW4 was recalled to the stand. He confirmed on cross-examination that he did not know Wanyoike's phone number.
 14. PW5 was Police Constable Bernard Waweru. On 19th September 2007, he received a report of the murder. He; Chief Inspector Mwanza; P.C. Omondi; and, scenes of crimes officer (PW8) went to the scene. They found some Administration Police Officers from Maili Nne. They entered the house of the deceased. Tied around her neck was a piece of cloth. It had red and white stripes. Another piece of cloth was stuffed into her mouth. One relative suspected that Joseph Kamau had something to do with the murder. The scenes of crimes officer (PW8) took photographs at the scene. He produced them together with a relevant report (exhibits 1 and 3).
 15. PW5 referred the matter to the C.I.D. Joseph Kamau was later arrested. He said that after some further investigations, the latter was released as per O.B. number 72/19/9/07. On cross-

- examination, he said he was the initial investigating officer. He said that he did not conduct an identification parade; and, that he did not know the motive of the murder. He denied that the scene was tampered with; or, that it was stage managed. He conceded however that photograph numbers 5 and 6 showed the body lying on a cement floor whereas photograph 11 showed it lying on a red carpet. He did not know who moved the body.
16. PW9 was Police Constable Osman Mohamed. He obtained telephone data from *Safaricom*. He analyzed the relevant data for the 18th, 19th and 20th July 2007. He believed that Wanyoike called PW3 trying to reach his father. In the process, PW9 discovered that the out-going calls from the deceased's phone were being diverted to someone else in the area. PW9 proceeded to Njabini. He also travelled to Nairobi where he tracked the phone calls. The mobile phone of the deceased was finally recovered. The serial number tallied with the purchase receipt and the IME number (exhibits 4 and 5).
17. When the accused was placed on his defence, he elected to make an unsworn statement. It was a brief one-
- “I do casual work. I do not know anything about the charge before the court. The person who would have something to say is John Wanyoike. I have no witnesses. That is all.”*
18. I have considered the evidence and the law. Section 203 of the Penal Code provides that *any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder*. There are three key ingredients that *must* be present in the offence of murder: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was *of malice aforethought*.
19. There is *no* eye witness account to the homicide. The closest link is the evidence of PW1. On the material night, he was far away in Nairobi. He spoke to the deceased on phone. The deceased was in Maili Nne, Eldoret. She told him that she had two visitors, Chege and Wanyoike (previously the 1st and 2nd accused). The deceased said that the two told her that someone named *Joseph* was planning to kill her. PW1 said *Joseph* was his nephew. In cross-examination, it was alleged that PW1 was the *Joseph* in question. PW1 denied ever having called Wanyoike. His evidence must thus be treated with utmost *caution*. What is material is that the deceased *never* said that the *accused* was plotting to *kill* her. She said the person who wanted to kill her was *Joseph*. PW1 did not thus tender any concrete evidence linking the accused to the murder.
20. I am also fortified in that finding because the “*young boy*” who spoke to the village elder (PW2) never took to the stand. The *boy* told PW2 that Wanyoike “*told the deceased that if the deceased did not give him [Wanyoike] some money he would kill her*”. That entire evidence was classic *hearsay*. On cross-examination, PW2 could not even remember the name of the boy. In the end, there are *suspicions* that the accused had a hand in the death of the deceased. But they remain just that.
21. The evidence of PW3 and PW4 related to *John Wanyoike* and not the present accused. PW3 had employed Wanyoike. He identified him at the police station in Eldoret. The evidence of PW9, P.C. Osman Mohamed, linked Wanyoike to the Nokia mobile phone belonging to the deceased. PW4 confirmed he had spoken to Wanyoike on 18th August 2007; but he had no recollection of Wanyoike's mobile phone number. PW5 was the investigating officer. He confirmed that Joseph Kamau was a suspect; and, had been arrested. For reasons that are not clear the suspect was released as per the details in O.B. number 72/19/9/07. The scenes of crimes officer (PW8) produced the photographs taken at the scene.
22. The entire prosecution case hangs on a very thin strand of circumstantial evidence. Unfortunately there is no *compelling* circumstantial evidence pointing *irresistibly* and *exclusively* to the culpability of the accused. In *R v Kipkering arap Koske & another* 16 EACA 135 (1949) the court held-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”

23. See also *Sawe v Republic* [2003] KLR 364. The only *fact* that is *not* in doubt is that the deceased *died* from asphyxia due to manual strangulation. The accused has protested his innocence. It remains a matter of theory or conjecture who attacked and strangled the deceased. The accused states that the answer lies with Wanyoike. The legal burden of proof lay throughout with the prosecution. It never shifted to the accused. The accused had no obligation to fill in the gaps for the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332, *Abdalla Bin Wendo and another v Republic* (1953) EACA 166, *Kaingu Kasomo v Republic*, Court of Appeal at Malindi, Criminal Appeal 504 of 2010 (unreported).

24. In the end, I find that the prosecution failed to *prove* beyond reasonable doubt that the accused, *of malice aforethought caused the death of Margaret Wako Toro by an unlawful act*. It must follow as a corollary, that the accused is *not* culpable. I accordingly enter a finding of *not guilty*. The accused is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 14th day of June 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Stephen Chege Ngomo (accused).

Mr. Rugut for Mr. Kigamwa for the accused.

Ms. G. Mokuu for the State.

Mr. J. Kemboi, Court Clerk.