



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 21 OF 2013

LESIT, J.

REPUBLIC.....PROSECUTOR

VERSUS

AGGREY MANG'ONG'O AMUGUNE.....ACCUSED

JUDGMENT.

1. The accused **AGGREY MANG'ONG'O AMUGUNE**, is charged with two counts of **Murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are as follows:

“Count I –On the 24thOctober, 2011 at South C Estate within Nairobi County jointly with others not before court murdered AMINA FALZADIN.

Count 2 – On the 24th October 2011 at South C Estate within Nairobi jointly with others not before court murdered MOHAMED AFZAL RASPOT.”

2. The prosecution called a total of 13 witnesses. Muchemi, J started the case and heard PW1 to 8. I took over from PW8. The facts of the prosecution case were that the accused was employed by deceased Amina to do compound cleaning and car washing. The entrance to that compound was through a gate which remained locked and the key kept by the family members. There were 2 main gates into the estate where the house was each manned by a guard. However the guards never kept a record of the vehicle or pedestrian traffic in and out of the gates.

3. Accused worked 3 days a week and was paid weekly at the rate of 300/ per day. By the time the incident occurred he had only worked for 2 weeks.

4. Amina shared the house with her two brothers PW1 and the deceased Raspot and their friend PW2.

5. Concerning the day in question the accused reported to work at 9 a.m. He usually left work between 3.30 and 4 p.m. At 11.30 a.m. PW2 left the house leaving behind the accused, PW1, deceased Amina and deceased Raspot. At 12.30 p.m. an hour later, PW1 left the house for prayers at the mosque leaving the accused, and both deceased Amina and Raspot. Both deceased were in good health.

6. At 2 p.m. PW1 returned home to find the accused gone and both deceased unconscious with severe cuts

on their heads and other parts of the body. He organized to have both taken to hospital. Amina was taken to South C Medical Clinic and Raspot to Mater Hospital.

7. Both deceased did not survive. They were declared dead at the respective hospitals. At the same hospital facilities they were taken to post-mortem examination was carried out. The doctor formed the opinion that the cause of death of both deceased was severe head injuries due to blunt trauma. PW12 the pathologist produced the Post Mortem Reports as P. Exh. 11 and 12.

8. The Police took 11 months to trace the accused. After searching for him in Kawangware and Kakamega, on the 13th September, 2012 PW13 and other police office found accused serving at the front of the church they were led to by an informer. Immediately the accused saw them enter the church, accused ran out through the front door. PW13 and his colleagues arrested the Pastor, PW5. The two officers returned back to the same church at 4.40 p.m. and this time managed to arrest the accused. Eventually the accused was charged for this offence.

9. The accused was placed on his defence and he gave a sworn defence. He admitted that he was an employee of deceased Amina and that he went to work at the home of both deceased and PW1 on 24th October 2010 in the morning. The accused stated that at 11 a.m. he informed the deceased Amina that he had gotten another job and would be leaving at that time. He said that he left the two deceased persons and PW1 when he went away, and that they were in good health. He said that he learnt of their death when he was arrested. The accused stated that he went to his job at Msafiri Hotel which his elder sister, DW5 helped him find. She also took him to the hotel as he did not know how to get there. He said that he remained in his house in Kawangware and never moved houses at any time.

10. The accused called four witnesses. PW2 was his mother. Her testimony was to effect accused did not go home and that on 15th December 2010 when people visited her asking for him, the accused was not home. They visited again on a date she could not recall and did not find accused.

11. DW3 was a Foreman in construction sites. He testified that he met accused in church in Kawangware. He said that accused was Assistant Pastor. DW3 said that he also got accused construction work once in a while. DW3 stated severally that the accused never disappeared from the church at any one time. He however, admitted that he did not know where accused was on 24th October 2011.

12. DW4 was the accused younger brother. He told the court how a woman and some men visited his home introducing himself as members of an NGO. They took the names of all his family members from him. Before leaving the group promised to pay his fees and gave him an assignment. DW4 said he dropped out of school because the group did not keep their promise.

13. DW5 was elder sister of the accused. Her evidence was to the effect that she took accused into her home in 2009. DW5 stated that the accused never got permanent employment. That on 24th October 2011 DW5 approached her former boss for a job position for the accused but he told her no job opportunity was available at his place. DW5 testified that on Saturday of same week, her former boss went to her and informed her of a position of a cook available at New Msafiri Hotel opposite Coast bus in town. The former boss informed her that the position was available from the following Monday. DW5 said that she took the accused to that job on the Monday and he started work.

14. The case was prosecuted by Ms. Onunga, Learned Prosecution Counsel. The accused was defended by Mrs. Gulenywa advocate.

15. The accused is charged with murder contrary to **section 203** of the **Penal Code**. **Section 203** defines murder as:

“203. Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

16. There are three ingredients for this offence; one that the deceased died; two that the accused caused their death; and three that at the time the accused caused the death of the deceased, he had formed the necessary malice aforethought or intention to cause death or grievous harm to the deceased.

17. The circumstances which constitute malice aforethought are set out under **Section 206** of the **Penal Code** as follows:

“206. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

a) 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;

b) 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;

c) an intent to commit a felony;

d) 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.”

18. The accused is charged of committing the two murders with others not before court. Before being charged with murder, the accused was charged with PW5 of robbery with violence in relation to the same facts. That charge was later withdrawn, the accused person charged with murder and PW5 turned into a prosecution witness.

19. Mrs. Gulenywa raised several issues. It was counsel’s submission that the prosecution was relying on circumstantial evidence. In regard to motive to commit the offence counsel urged that the accused had worked only six days over two weeks and therefore hardly knew anything about his employer. Counsel also urged that in terms of opportunity the two or three hours PW1 left him with the deceased was too short for him alone to murder two people.

20. Mrs. Gulenywa urged that the accused did not have the keys to the gate yet when PW1 returned that afternoon he found the gate locked. Counsel took issue with investigations submitting that no finger prints were lifted at the scene and the axe recovered at the scene was not produced as exhibit.

21. Ms. Onunga, Learned Prosecution Counsel submitted that the prosecution evidence had placed the accused at the scene of murder. Counsel urged that the accused had worked for 2 weeks and was well known to PW1 and 2. Ms Onunga urged that the deceased were last seen alive with the accused and so had to explain what happened to them. Furthermore Ms Onunga urged that the accused usually worked between 9 a.m. and 4.30 p.m. and that on 24th October 2011, he abandoned work before time.

22. Ms. Onunga submitted that PW5 testified that the accused sought his help to look for a house in order to shift from his Kawangware house. That PW5 testified he helped shift accused from Kawangware on the 24th October 2011 and that the accused disappeared until 13th October 2012 when he was arrested.

23. I have carefully considered the entire evidence adduced by the prosecution and the defence in this case and submissions by both counsels. Having done so the following are the issues which arise in this case.

(i) Whether the circumstantial evidence adduced in this case meets the requisite threshold and whether it is sufficient to sustain a conviction?

(ii) Whether any weapon was recovered in this case?

(iii) Whether the prosecution has proved malice aforethought?

(iv) Whether the prosecution proved motive for the murder, and whether failure to prove motive is fatal to the prosecution case?

24. There are certain facts which are not in dispute in this case. It is not in dispute that the accused had been employed by the deceased Amina to do general cleaning jobs at her home. There is no dispute that Amina shared her home with her two brothers PW1 and deceased Raspot and a friend of the family PW2. There is no dispute that the accused worked 3 days a week between 9 a.m. and 4 p.m. including Monday and Saturday, for 300/- a day. There is no dispute that he had worked only six days when the incident occurred. There is no dispute that the accused reported to work on morning of 24th October 2011 and that he left before time. There is no dispute that the day the incident occurred was a Monday.

25. The prosecution is relying on circumstantial evidence to prove this case against the accused person. Regarding circumstantial evidence, it has been said to have the potential of being the best evidence. In the English case of ***R. vs. Taylor Weaver & Donovan (1928) 21 Cr. App. Reports 20***, the court held:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

26. In ***SAWE –V- REP[2003] KLR 354***, the Court of Appeal held as follows:

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused...”

27. In regard to where circumstantial evidence has been established against an accused person, the Court of Appeal case of ***ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990***, held:

“In RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226, the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect.

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent evidence available”.

28. The prosecution has adduced evidence which placed the accused at the scene of the incident. The accused also admits that he was at the South C home of PW1, 2 and both deceased from 9 am that day.

The prosecution has shown through PW2 that at 11:30 am when PW2 left the home, the accused was still there, and so were both the deceased persons and PW1. PW1 testified that he was the last to leave the home at 1 p.m. leaving the accused with both deceased, with the accused working outside the house and both deceased inside the house. PW1 said that he left at 1 pm and that his destination was the mosque for prayers.

29. The accused contradicted PW1 saying that in fact he, the accused left at 11 am after telling the deceased Amina that he was off for good as he had gotten another job.

30. Who could be telling the truth, did the accused leave his job or did he run away is the question that beckons. I have considered the rest of the evidence before the court in an effort to unravel the truth.

31. Apart from PW1 who said that the accused disappeared mysteriously after he left him, and the sordid State in which he found their home full of blood everywhere; and the battered and butchered state of his siblings who were also unconscious and one lying on the floor and one on the bed of the house. We also have the evidence of PW5, the pastor and friend of the accused. His testimony was to the effect the accused called him on phone at 7 am on 25th October, 2011 asking him to meet him at Westlands which PW5 did. PW5 testified that the accused confessed to him that he had hit his boss and son with a piece of wood in South C where he worked for them. PW5 testified that the accused informed him that they had disagreed with his boss over delivery of cocaine and that it was the reason he attacked the two.

32. PW5 continued to testify that his advice to the accused to report the matter to the police was flatly declined. Instead the accused requested him to look for another residential house preferably along Wanyee Road. PW5 stated that he actually got the accused a house along Wanyee Road on the same day and also using his vehicle carried his goods to his new house.

33. From the evidence of PW5 it is clear that the accused confessed to hitting his employer and the son. The facts are twisted as he did not hit an employer and the son, but an employer and the sibling. What the post mortem shows is that the deceased Amina had deep cuts on the head inflicted by a blunt object. The deceased Raspot had multiple bruises and lacerations on the face, head and hands caused by blunt object. These injuries are consistent with the accused confession to PW5 that he hit his victims.

34. The other fact which comes out of PW5's evidence is the fact the accused shifted from his house where he had been staying one day after the incident. The third fact which is evident in PW5's evidence is his testimony that the accused informed him, five days after shifting from his house that he was going home. PW5 stated that indeed the accused went home for one and a half months which he became aware because when the accused wife returned to Nairobi alone, she did not know their new home and she went to him to assist her locate the house and that he took her there.

35. The fact of accused moving away from Nairobi is confirmed in evidence of PW7. PW7 testified that the Safaricom data on accused phone was showing that the phone was being used in Turbo, in Eldoret not long after the incident. That is when PW7 sent his team to look for accused in his home area.

36. PW7 and 10 confirm that they looked for the accused for 11 months. PW7 who was the Superintendent of Police overseeing the investigations testified that he even went up to accused house identified to him by informers, in Kawangware area on 28th November, 2011. He still did not get the accused at night as he had been promised. Instead the house was empty. PW7 testified that he got information accused was in a church in Kawangware and that he managed to trace the church two weeks after the house visit. This time the accused switched off his phone completely.

37. PW7 sent 3 officers to look for the accused in his home. Among them was PW10, PC Kyalo and two others. His evidence is that they made two trips to Kakamega, to the home of the accused and could not find him. The visits were in early November and in December, 2011.

38. According to PW10, the accused mother told him that the accused had stopped using his phone because he was being tracked down using satellite. That is when PW10 obtained the phone numbers of

DW2 and 4 and using them got the orange line the accused had switched to using, No. 0728272286. The data from the phone numbers of DW2 and 4 was P. exhibit 5. That phone number of the accused led PW7 and 10 to Kawangware, to a certain church.

39. PW7 testified that he and his team were totally unable to get the accused and so he directed PW13 of Flying Squad to assist in tracking the accused in March, 2012.

40. PW13 is a Police Corporal who took over the file with instructions from PW7, his senior said that led by informers he proceeded to a Holiness Church in Kawangware on the 13th September, 2012 during church service in the morning. He said that the accused ran out through the front door of the church upon seeing them. PW13 returned later in the evening and arrested the accused.

41. I find from the evidence adduced by the prosecution four confirmed facts. One that the accused was on duty and reported to work at the home of the deceased persons in the morning in question as expected. He worked that morning up to afternoon at the time PW1 left him with the two deceased persons. Secondly the accused fled from the home of the deceased without notice and at the time he fled, the deceased were last seen alive in that home by PW1. Thirdly the accused shifted from his house and went into great lengths of hiding from the police for a period of 11 months. Fourthly by the time the accused was tracked down by police in a church service where he was ministering in the front area, the accused escaped through a front door on seeing the police enter through the back door.

42. I find that the prosecution have established that the accused was at the scene of crime on the day the offence was committed, that he had the opportunity to commit the offence and that he made his exit after PW1 left him with the deceased alive and well. By the time PW1 returned the accused had disappeared and both deceased had been fatally wounded. Further, the accused made a confession to PW5 that he had hit two people without giving any details of their fate. That evidence is unchallenged by the defence.

43. Given these facts the accused has a statutory burden to discharge a rebuttable presumption which in this case is the fact the deceased persons were last seen alive in his company. In the circumstances he should explain either how they met their death or how they parted company.

44. This statutory burden is created under **sections 111(1) and 119 of the Evidence Act** which provides as follows:

111.(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

45. The accused has given an explanation in his defence. He admitted reporting to work that day. He however claimed that he left at 11 am because he got a job and was reporting there that day. Regarding the job the accused called DW5 his sister. DW5 testified that she first approached her former boss on the 24th October 2011 asking for a job opportunity for the accused. She said that the former boss told her

there was no job but on a Saturday following 24th October, he went to her place and told her that there was a job at a hotel called Msafiri which was available the following Monday. If DW5's evidence is analysed it means that the accused started work in his new job on the Monday after 24th October because DW5 was sure in her evidence that she started to look for a job for the accused on the 24th. That being the case, DW5's evidence does not assist the accused as it appears the dates she gave do not tally with those given by the accused.

46. There could however be an innocent explanation for DW5's contradiction such as forgetting the details and dates of events of the time. In fact I noted that according to PW5, the accused had told him on the 25th that he had gotten a new job at New Msafiri. However on the 25th when the accused called PW5 to help him shift from his house, it is not clear whether he had reported to the new job. What is clear from PW5's evidence is that the accused was moving houses in order to avoid arrest.

47. The accused did not explain the allegation by PW5 that he confessed to having hit two people with a piece of wood; and that PW5's suggestion to him that he reports to the police was declined. I noted from the proceedings that the defence in cross-examination of PW5 did not suggest to him that he had lied concerning any matter he alleged the accused told him.

48. Instead the cross-examination dwelt on the reason of his arrest together with the accused and his being charged with him with charges of robbery with violence. In his response PW5 testified that he was charged because of a statement the accused gave to the police implicating him with the murder of the two deceased persons. PW5 explained that the charge was later withdrawn as against him when the accused changed his statement exonerating him.

49. I find that the prosecution has shown the efforts they put in and the length they went to in order to arrest the accused person. They also demonstrated that the accused moved from Nairobi to the Rift and later Western before returning back to Nairobi to a different house. The police were only able to arrest him in church. I am satisfied that the accused went into hiding soon after this incident. I am satisfied that the accused conduct of going into hiding after the incident was evidently the conduct of a person with a guilty mind.

50. The other issue was whether the prosecution had proved malice aforethought. In **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond any shadow of doubt.”

51. I am well guided. In this case the deceased had severe injuries on their heads which led to their death before any medical intervention could be undertaken. In addition, the deceased bled heavily from the injuries until PW1 and the Police Officers who visited the scene when still fresh, PW7, 9 and 10 described the home as full of blood everywhere; on the walls, floors, stairs, beds and splatters all over the house. Those splatters on the walls and floors and the injuries on the deceased bodies are all evidence of the deceased having been hit repeatedly. I am satisfied that the repeated blows constitute malice aforethought under section **206 (b)** of the **Penal Code**.

52. Regarding recovery of the murder weapon, Mrs. Gulenywa in her submissions urged that the prosecution did not produce as an exhibit the axe recovered at the scene. With due respect to the defence counsel, there was never any mention of recovered murder weapons at any stage of the investigations. If

there was such a recovery, perhaps even the scene of crime officer, PW9 would have mentioned it in his report. There was no such evidence.

53. That said I must say that I agree with the defence counsel that there was so much concentration at tracing the accused that certain aspects of the investigations were ignored. The most outstanding one is the failure to lift finger prints at the scene of crime. There was evidence of drawers having been pulled out and finger prints on walls and of scattered items of utensils and other items in various rooms in the house. Why didn't the police think of taking finger prints?

54. In regard to the issue of motive, Mrs. Gulenywa submitted that the accused was so new in that house that he hardly knew anyone there. In **Choge vs Republic (1985) KLR 1**, the court of appeal held as follows:-

“Under section 9(3) of the Penal Code (cap 63) , the prosecution is not required to prove motive unless the provision creating the offence so states, but evidence of motive is admissible provided it is relevant to the facts in issue. Evidence of motive and opportunity may not of itself be corroboration but it may, when taken with other circumstances, constitute such circumstantial evidence as to furnish some corroboration sufficient to establish the required degree of culpability. The evidence of the ill-feeling between the deceased and the 1st appellant would have been a corroborative factor if the other evidence had been satisfactory which it was not.”

55. As provided under **section 9(3)** of the **Penal Code**, the prosecution do not have a burden to prove the motive for a murder so that if none is apparent in any case, that would not prevent them from arraigning a person before the court. Where motive is proved it goes a long way to strengthen the prosecution case. No motive was apparent in this case. However it is clear the police followed two leads, robbery at the home and satanic sacrifice.

56. Having considered all the evidence adduced in this case, I find that the circumstantial evidence adduced by the prosecution in this case has established beyond any reasonable doubt that the deceased were last seen alive in the company of the accused, that the accused had both the opportunity and time to commit the offence and that his conduct of going into hiding after the incident was conduct of a person with a guilty mind.

57. I find that the circumstantial evidence adduced by the prosecution unerringly points towards the accused guilt and taken cumulatively forms a chain so complete that there is no escape from the conclusion that within all human probability that the murders were committed by the accused and none else.

58. Having come to the conclusion I have of this case, I find that the prosecution has proved its case against the accused beyond any reasonable doubt. I reject the accused defence, find him guilty in both counts of murder contrary to **section 203** of the **Penal Code** and convict him accordingly under **section 322** of the **Criminal Procedure Code**.

SIGNED & DELIVERED AT NAIROBI THIS 28th JULY, 2016.

LESIIT, J.

JUDGE