



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCR 50 OF 2011

REPUBLIC.....PROSECUTOR

VERSUS

GEOFFREY KALUNGE LIMIRI.....ACCUSED

JUDGMENT

Geoffrey Kalunge Limiri faces a charge of murder contrary to **Section 203 as read with Section 204 of the Penal Code**. The accused is alleged to have murdered **Festus Bario Gitirine** on 22/9/2011 at Thibiki Village of Karama Location in Tigania.

The prosecution called a total of 9 witnesses while the defence called two witnesses. The prosecution was conducted by Learned Counsel Mr. Mungai and Mulochi while the accused was represented by Mr. Gichunge Advocate.

PW1 Cyprian Gitirine Nabea is the father of the deceased. He testified that while at home on 22/9/2011, one Geoffrey Mwambia (PW6) informed him that his son Festus had been hit and was lying on the road unconscious. He went with Mwambia, found Festus at Thibiki, took him to Hospital but he died along the way. PW1 noted an injury to Festus' head. PW1 said that he had a land dispute with Geoffrey Limiri; that the mother of accused used to cultivate the disputed land before it was transferred to him and he fenced it off; that after that, accused used to threaten him and his family that he would kill him or his son; that accused had removed the beacons from the land; that he had reported to the Chief who referred him to Lands Office. They went to Lands Office and accused was told that the land was not his but he still went ahead and uprooted PW1's crops; that accused had even threatened PW1 with death in front of the Chief.

PW2 Faith Kananu Cyprian is a sister to Festus, the deceased. She recalled that in August, 2011 she was with her grandmother in her father's farm when the accused went there with a *panga* and told the grandmother that he had warned her not to step on that land and she had refused to heed; that he threatened that he would kill the grandson; that they continued to work on the land till 22/9/2011 when she was informed of her brother Festus' murder; that she arrived where Festus was when he was being carried away, and he mentioned the name 'Kalunge'.

PW3 Dr. Paul Mutua, produced the post mortem report on behalf of **Dr. Mutuku** who performed the post mortem. The Doctor was of the view that the cause of death was severe head injury secondary to trauma.

PW4 Andrew Kimathi received a call from Geoffrey Mwambia on 22/9/2011 about 11.00 p.m. who informed him that Festus was lying along the road, injured. He proceeded to the scene, found that Festus had been removed. He followed and helped carry Festus but after about 200 metres, they realized that he

had died and thereafter the mother and sister of Festus arrived; that later Mwambia called him and informed him that it is Geoffrey Kalunge who had injured Festus. He went in search of Kalunge, found him in a hotel and took him to the Police Station.

PW5 Francis Mukethia, a resident of Mbaranga told the court that he was in his hotel on 22/9/2011 about 9.10 p.m. when Festus Bario (deceased) went and gave him KShs.10/= which he owed and left; that about 11.00 p.m., Geoffrey Mwambia and other people went there and accused Geoffrey of allegedly murdering Festus; that Geoffrey had arrived at the hotel at 10.00 p.m. which was his normal reporting time and he did not know where he had come from.

Geoffrey Karia Mwambia (PW6) recalled that on 22/9/2011 he was involved in community policing in Mbaranga area; that he went home about 10.00 p.m. from the canteen and when going back to the canteen, near his gate, he found Festus Bario lying on his stomach, had an injury on left side of the head, the eye had come out; that he was able to talk a bit and told him that he was beaten by Kalunge. PW6 said he knew Kalunge to be the son of Mutisya. He informed those at the hotel, he was helped to carry Festus to the hotel by which time Festus was not able to talk and before the vehicle came to take him to hospital, he died. It is PW6 who informed the deceased's relatives about the incident. PW6 also said that accused had once chased deceased and his son and they ran into his home. He was aware that the accused and deceased's father had a bad relationship.

PW7 CPL Kazungu Ngumbao, then of Tigania Police Station received a report from the public about a person having been injured and was lying on the roadside and had been taken away by the public. He visited the scene with the DCIO and on returning to Police Station, found accused had been taken to Police Station with a club and greenish jacket; they revisited the scene and the suspect's house where they recovered a packet of baking powder which had blood stains. The Doctor was requested to draw deceased's and accused's blood which was forwarded to Government analyst for analysis and comparison with the blood stains found on the jacket, packet and club.

PW8 Sgt. Daniel Munguti testified that he went to the scene where deceased had been found lying with CPL Kazungu (PW7) and DCIO Chikanda; that they found deceased still alive but was bleeding from the head with blood stained clothes, picked him up but he died on the way to Hospital; that they then got information on the assailant, found him in his house and that he was wearing a blood stained jacket, recovered a *panga*, club and a packet of baking powder from accused's house; that the items were later forwarded to Government Analyst. The Government Analyst **Lawrence Kinyua (PW9)** did DNA profiling on blood samples and stains on the items submitted to him and recorded his findings in his report (PEX No.6) that the DNA profiling generated from the baking powder item C matched the DNA profile of the deceased while that from the green jacket matched the DNA profile of the accused. Nothing was found on the club and *panga*.

In his defence, the accused stated on oath that on 22/9/2011, he was at work at a hotel where he had been hired by PW5; that he worked from 6.00 p.m. to 10.30 p.m.; that the mob found him at work and alleged that deceased had mentioned Kalunge; that he was beaten by people and blood spilled on his clothes; he denied having had the packet with baking powder but that it is Geoffrey (PW6) who had it together with the *panga* and club and claimed to have found them in deceased's pocket. He denied having had any land dispute with deceased or his family. He also said that there are many people in his home area by name of Kalunge.

DW2 Duncan Muthuri, testified that on 22/9/2011 he went to a hotel at Mbaranga Market at 7.00 p.m. where he stayed while eating *miraa* till 9.30 p.m.; that at 9.30 p.m., somebody entered and said that the Kalunge they wanted was there; that Kalunge (accused) had been serving tea since 7.30 p.m.; that they started to beat him, handcuffed him and left with him.

In his final submissions, Mr. Gichunge, Counsel for the accused submitted that the prosecution had not proved its case to the required standard because nobody witnessed the deceased being assaulted; that the evidence is circumstantial and a dying declaration; that PW6 heard deceased mention Kalunge but Kalunge is a common name in the area; that as regards PW9's evidence, none of the samples had

accused's blood stains and accused's jacket did not have deceased's blood; that the accused's alibi defence has not been shaken. Counsel relied on the decision of *Shadrack Mbaabu Kinyua v Rep 163/2011*, where the Court of Appeal said that the dying declaration allegedly made to one person needed to have been corroborated.

Counsel also relied on the decision of *Musili Tulo v Rep CRA 30/2013* where the Court of Appeal found that the circumstantial evidence did not unerringly point to the accused as the perpetrator of the offence.

On the other hand, Mr. Mulochi, urged that the prosecution had proved its case to the required standard; that the circumstantial evidence points to the accused because he had threatened PW2 and family over a land dispute between them; that the items with which accused was arrested materially connect accused to the offence; that accused's employer confirmed that accused went to work after 9.00 p.m.; that there is no other evidence to prove that other Kalunges exist; that the defence is a bare denial.

In a murder trial, the burden always remains on the prosecution to prove its case beyond any reasonable doubt. In so doing, the prosecution has to prove the following ingredients:

- 1. The death of the accused;**
- 2. That the accused caused the death through unlawful act or omission;**
- 3. That the accused had malice aforethought.**

The post mortem was conducted on the body of the deceased by Dr. Mutuku, who was of the opinion that the cause of death was severe head injury secondary to trauma. The Doctor's findings corroborated the evidence of PW1, PW6 who observed the deceased after he was found injured.

Nobody witnessed the deceased being assaulted. PW5 seems to be the last person to have seen the deceased alive at about 9.10 p.m. of the same night. Deceased was found seriously injured after about 10.00 p.m. by PW6. It follows that this case wholly depends on circumstantial evidence. This court must examine the evidence on record carefully to ascertain whether it satisfies the principles that were set out in the celebrated case of *Rep v Kipkering arap Koske and another 16 EACA 135*. The principles have been echoed in many other cases including the one cited by Counsel, *Musili Tulo v Rep CRA No. 30/2013* Supra. The principles are as follows:

- (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.*

A further principle was set out in *Musoke v Rep (1958) EA 715*.

“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.”

PW6 is a teacher in the area where the offence took place and is involved in community policing. He told the court that he knows both the deceased and his family and the accused. In fact, PW4 was informed of the deceased having been injured by PW6, went to help carry the deceased and was present when deceased died. He said that later on, PW6 informed him that it is Kalunge who had assaulted the deceased. The question is whether that amounts to a dying declaration and whether the court can rely on

it. Such evidence has to be considered with a lot of caution. In **Shadrack Mbaabu Kinyua Supra** the Court of Appeal said the following of evidence of a dying declaration:

“We have considered the submission by the appellant challenging the existence and utterance of the dying declaration. If we find that a dying declaration was indeed made, the issue of its admissibility and the weight to be attached is well captured in the case of Pius Jasunga s/o Akumu v Rep (1954) 21 EACA 333, where the predecessor of this court stated:

*“The question of the caution to be exercised in the reception of dying declarations and the necessity for their corroboration has been considered by this court in numerous cases and a passage from the 7th Edition of Field o Evidence has repeatedly been cited with approval It is not a rule of law that in order to support a conviction there must be corroboration of a dying declaration (**Rep v Eligu s/o Odel & Another (1943) 10 EACA 9**) and circumstances which go to show that the deceased could not have been mistaken in his identification of the accused But it is generally; speaking, very unsafe to base a conviction solely on the dying declaration of a deceased person made in the absence of the accused and not subject to cross-examination unless there is satisfactory corroboration.”*

PW6 told the court that he was not aware of anybody else in the area by the name of Kalunge and once deceased mentioned the name, he knew it is the accused. In his defence, the accused denied that he was not the only Kalunge in the area and purported to name others e.g., the Sub-Chief. However, the names of the other Kalunges were never put to PW6 when he testified. If indeed they existed, there was an opportunity for the defence to question PW1, 2, 3, 4 and 6 but that was not done. In my considered view, the allegation that there existed other people by name Kalunge in the area is an afterthought. The accused did admit to knowing PW6 before. PW6 being a person involved in community policing and a teacher in the area, I am satisfied that he must have known people in the area.

PW1 told the court that they had a land dispute with the accused and accused had threatened him with death and harm to his family. PW2, daughter to PW1 repeated the same. Although accused denied that he had any dispute with the deceased and his family, PW6 did corroborate PW1 and 2's evidence that indeed, there was bad blood between accused on one hand and deceased, that accused had once chased the deceased together with his own son. I have no reason to doubt these three witnesses that the accused had threatened the deceased's family with harm over land. If there was no dispute between accused and PW1's family as accused alleges, then there was no reason for PW1 and 2 to frame him.

The accused raised an alibi defence, that he was at work on the material date from 6.00 p.m. to the time he was arrested about 3.00 a.m. DW2 claimed to have been with the accused at the said hotel. PW5, the employer of the accused was very specific in his evidence that the accused used to report to work from 10.00 p.m. till morning and that on that day, he reported to work at 10.00 p.m. The deceased had just been to the same hotel about 9.10 p.m. and was found on the road injured between 10.00 p.m.-11.00 p.m. The accused told the court that there was no reason that PW5 would have lied against him and that PW5 told the court the whole truth. That being so, I believe what PW5 told the court, that the accused was not at work between 6.00 p.m. and 10.00 p.m. He did tell the court the full truth. I believe and find that accused reported to work at 10.00 p.m. on the material day and therefore had the opportunity to commit the offence. DW2's testimony is not convincing. He had known the accused for only 21 days and one wonders how he got to have DW2 to come to testify.

When an accused raises an alibi defence, that does not in any way lighten the prosecution's burden to prove its case beyond any doubt. The accused has no duty to prove his innocence. In **Uganda v Sebyala & Others 1969 EA 204**, the Judge quoted George CJ in **CRA 12D 6B of 1969**, where he observed:

“The accused does not have to establish that his alibi is reasonably true. All he has to do is to create a doubt as to the strength of the case of the prosecution. When the prosecution case is thin on alibi which is not particularly strong may very well raise doubts.”

It was held that when an alibi is raised, it is enough if it casts some doubt on the prosecution case. In my

view, the alibi raised by accused did not in any way dislodge the prosecution evidence.

PW4, 5 and 6 told the court that the accused was arrested from PW5's hotel. PW7 did confirm that indeed, the accused was taken to the police station by members of public and that they took to the police station the accused's jacket which was blood stained and a club. However, PW8 who was in company of PW7 when they visited the scene told the court something totally different, that they are the ones who took deceased to Hospital and that they arrested the accused in his house. I found PW8's evidence untrue. I prefer the evidence of PW4, 5, 6 and 7 on how the accused was arrested. I have no idea why PW8 tended to exonerate.

PW7 and 8 said that later they visited the accused's house where they found a packet of baking powder which had blood stains and that was forwarded to the Government Analyst PW9, who found that the DNA profiling from the blood stains on the packet (C) matched the DNA profile generated from the blood (Item D) of the deceased – Festus Bario. In his defence, the accused claimed that the packet of baking powder was with PW6. However, when PW6, 7 and 8 testified, that allegation was never put to them. It is an afterthought. I am satisfied that the packet of baking powder was found in the accused's house. It had deceased's blood. The only conclusion that this court can arrive at is that the accused came into contact with the deceased on the night he was injured, after he was injured and that squarely puts him at the scene of the incident and corroborates PW6's evidence that the deceased named the accused as the assailant.

Whether malice aforethought has been proved: The Doctor who performed the post mortem found that the deceased had a swollen left eye with conjunctival haemorrhage; bleeding on both nostrils and mouth, boggy felt on the occipital parietal region and on the temporal region. On internal examination of the head, the Doctor found huge scalp haematoma on occipital-parietal region and left temporal parietal region, huge linear fracture extending from right temporal parietal region to left temporal parietal region. The cause of death was severe head injury secondary to trauma. The injuries inflicted on the deceased were severe and they were not one but several. They were inflicted on a delicate part of the body, the head, resulting in fractures. Malice aforethought flows from the serious injuries inflicted on the deceased.

In conclusion, I find that the circumstantial evidence does point to none other than the accused as the perpetrator of the offence. Accused was named by the deceased as the assailant, accused was not at work at the time and soon after arrest, a packet of baking powder stained with deceased's blood was found in accused's house. I find that the circumstances under which the deceased was murdered form such a complete chain that there is no escape from the conclusion that, in all human probability, the offence was committed by the accused and none else. I dismiss the accused's defence as baseless and an afterthought. I find him guilty as charged and convict him under **Section 322 of the CPC**.

DATED, SIGNED AND DELIVERED THIS 21ST DAY OF JULY, 2016.

R.P.V. WENDOH

JUDGE

21/7/2016

PRESENT

Mr. Mulochi for State

Mr. Gichunge for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused