



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 33 OF 2007

REPUBLIC

VERSUS

JOHN MACHARIA KIMANI

JUDGMENT

Mischek Maina Kimani (deceased) went missing from his home on 15th February, 2007; two days later, and more particularly on the 17th day of February, 2007, his lifeless body was retrieved from a river bank, in Kagiko village, Murang'a County. The deceased's father (PW4) and his two brothers (PW2 and PW3) suspected that the accused person, who was also the deceased's brother, murdered him; they therefore arrested the accused and took him to the police station where upon investigations he was charged with the present charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code, Cap. 63**.

The particulars of the offence were that between the 15th day of February, 2007 and 17th February, 2007 at unknown time at Kagiko village in Murang'a District within central province, the accused murdered Misheck Maina Kimani. He pleaded not guilty to the charge and therefore the state called several witnesses to prove the offence against him; except for the two police officers and the doctor who conducted the post-mortem on the deceased's body, all the prosecution witnesses were the accused person's close family members.

John Wainaina Ndirangu (PW1) was one of these witnesses; he was related to the deceased in the sense that the deceased was a son to his uncle. His evidence was that he was from the market on his way home on 15th February, 2007 at around 7 pm when he heard the deceased screaming from his (the deceased's) home and saying "stop, stop." His own house was about 100 metres from that of the deceased (though in cross-examination, he said that his house was only 10 metres away). He proceeded to his uncle's home and asked **Thuo (PW2)** another of his cousins (and a brother to the deceased) to proceed to the deceased's place and find out why the deceased was screaming. He then left and went back to his home. He later learned on 17th February, 2007 that the deceased had been murdered; he visited the scene where the body was recovered. He noticed that the body was swollen but with no visible injuries.

At his cross-examination, the witness testified that he was a neighbour to both the deceased and the accused and that his house was closer to the deceased's house than that of the accused person; while the accused person's house was 50 metres away from the deceased's house his was only 10 metres away.

Ibrahim Thuo Kimani (PW2) testified that both the deceased and the accused person were his brothers and that on 15th February, 2007 he was on his way home together with his brother Joseph when they met **John Wainaina Ndirangu (PW1)**; he told them that there was trouble at home and therefore they rushed to the homes of the deceased and the accused person. They met the accused person at his gate; he was

armed with a panga and he warned them against entering his compound; infact he chased them away. They went back to their homes without bothering to report to anybody because they thought it was the usual quarrels the deceased and the accused person used to have. This witness testified that they neither saw the deceased nor heard him scream on the material evening of the 15th February, 2007 and infact this particular witness could not tell whether or not the deceased was at his home on that day.

The other of the deceased's and the accused person's brother was **Joseph Kariuki Kimani (PW3)**. He testified that he was together with his brother going home on 15th February, 2007 at about 7.00 pm when he met **Wainaina (PW1)** who told them that he had heard screams from the deceased's house. They went to check out but when they reached there the accused person chased them away. On 17th February, 2007 he learnt of the deceased's death.

The deceased's father **Kimani Kariuki Kihara (PW4)** testified that on 17th February, 2007 at around 5 pm some two people came and told him there was a body dumped near a river; he visited the scene and identified it be that of his son. He also testified that the last time he saw the deceased was on 15th February, 2007 at about 4 pm and that he was with the accused seated on a bench outside the deceased's house. The two, according to his evidence, lived harmoniously in the same compound.

It was his evidence that the accused was arrested because **Wainaina (PW1)** had told the deceased's brothers that he had heard the deceased and the accused quarrel; however, to his knowledge, his sons never quarrelled and they enjoyed a cordial relationship.

Chief Inspector of Police **Benjamin Wambua (PW6)** testified that on 17th February, 2007, one Karuga reported that a human body had been seen at Kagiko village. He recorded the report and proceeded to the scene with his colleagues, police constables, Kimunya, Shiundu and Musau. They found the deceased's body lying beside a stream; it was swollen and had no visible injuries. On the same day, at around 8.00 pm, the accused person was brought to the station by his father and brothers as a suspect for the murder. The officer testified that according to the post-mortem report the deceased died of trauma as a result of an injury caused by a blunt object. According to him, there were indications that the deceased may have been murdered and thrown into the river to conceal the murder. In the course of his investigations, the officer conducted a search from the accused person's home; he recovered two pangas and a hammer like metal. He also retrieved a knife from a latrine that was under construction. It was his evidence that something appeared to have been dragged from the compound and the trails led him to where the deceased's body was recovered, about 200 metres away.

The officer also recorded statements from the deceased's brothers, **Ibrahim Thuo Kimani (PW2)** and **Joseph Kariuki Kimani (PW3)**; they told him that on 15th February, 2007, they were coming back home from the market; they entered the deceased's home where they heard a commotion and screams of someone seeking for help; he was saying "do not kill me". They could not however, enter the compound as the accused person threatened to harm them if they did. The officer subjected the items recovered from the accused person's home to forensic examination; however, the examination results did not link the accused to the murder.

Dr Kethi Dindi (PW7) who conducted the post-mortem on the deceased's body formed the opinion that the deceased died as a result of severe head injury caused by both sharp and blunt objects. In his evidence, he testified that there were stab wounds on the head and on the umbilical region. Some of the fingers on the deceased's left hand had also been chopped off. In answer to questions during cross-examination, the doctor said that the injuries could possibly have been sustained by a fall. He also said that the deceased smelt of alcohol.

The accused person opted to give sworn testimony when he was put on his defence. He admitted that the deceased was his brother and their houses were next to each other; apart from the deceased's house other neighbouring houses were those of his parents, his brothers (**PW2 and PW3**) and his cousin **Wainaina (PW1)**.

On 15th February, 2007, so he testified, the deceased called him; the deceased was then having two cans of alcohol. He offered some alcohol to the accused but the latter declined. The deceased then told him that he wanted to return the alcohol containers to their owner. The accused left him and went to his place and could not tell whether the deceased left his home. The accused went to work as usual the following morning and it was not until the 17th February, 2007 that he learned that his brother had been killed. He denied having murdered his brother; he also denied having chased away his brothers away while armed with a panga.

The accused person's mother, **Cecilia Wangeci (DW2)** also testified on his behalf. She said that both the accused person and the deceased were her sons. The witness testified that the two, together with their other brothers all lived with them on the same parcel of land though they had separate homesteads. **Wainaina (PW1)** was closer to the deceased than the rest of the other family members. The witness testified that the deceased was to do some work for her on 15th February, 2007; she saw him go to work but that he never came back. She later learned that her son had been killed. She denied that the deceased and the accused person had any grudge.

In her submissions at the close of the defence case, counsel for the accused person urged that the only evidence against the accused person was circumstantial but which fell short of the required standard of proof. In particular, counsel submitted that it was not established whether there was any quarrel between the deceased and the accused person; on the contrary, the accused person's parents testified that both the deceased and the accused person enjoyed a cordial relationship. Relying on the decisions in **Republic versus Kipkering Arap Koske (1949) 16EACA 135** and **Criminal Appeal No. 218 of 2006, Judith Achieng Ochieng versus Republic** on circumstantial evidence, counsel submitted that there was no evidence that the accused person's conduct was incompatible with his innocence.

Counsel for the state submitted that the case against the accused person was proved beyond all reasonable doubt and that the accused properly charged and convicted. While he admitted that the evidence against the accused person was only circumstantial, counsel urged that it was sufficient enough to establish that the accused person was culpable for his brother's murder. In this regard, counsel submitted that the accused person was the last person seen with the deceased alive; that there was also evidence that the two lived in the same compound and that they quarrelled on the material day; that accused person also chased away his brothers when they sought to find out the reason for the deceased's screams apparently because he knew that he had killed him; and finally, the doctor's evidence was clear that the deceased's death was not natural. All these instances, according to the learned counsel for the state, pointed to the accused person's guilt rather than to his innocence and urged this court to draw this inference accordingly.

Having considered the evidence on record and the submissions by both counsel for the state and the accused person, it is apparent that none of the witnesses ever saw the accused person injure or kill the deceased; if anything, they all denied that they knew who the murderer was. In the absence of any direct evidence linking the accused person to his brother's death, I agree with both learned counsel for the state and the accused person that the only evidence available against the latter was indirect or circumstantial evidence, as is commonly known. The case against the accused person revolves around this aspect of evidence.

Section 164 of the **Evidence Act, Cap. 80** appears to make reference to this sort of evidence where proof is sought of any particular fact; it states as follows:-

164. Circumstantial questions to confirm evidence

When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

I understand this section to mean that if there is proof of circumstances that tend to confirm the evidence of a witness as to the existence of a particular fact, the court may rely on such evidence of circumstances

that may have been observed at or near the time or place the fact in issue occurred. If the circumstances are proved beyond reasonable doubt, the court may convict in the absence of direct evidence; however, circumstantial evidence must be narrowly examined before drawing any inference and coming to any conclusion. The court must be satisfied that the circumstances are such that no other inference can be drawn from them other than that of guilt on the part of the accused person. The leading decisions on this issue are **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and **Simon Musoke versus Republic (1958) EA 715**.

In **Republic versus Kipkering Arap Koske & Another**, the Court of Appeal for Eastern Africa quoted **Wills on Circumstantial Evidence** and held that:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. 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 on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

In **Simon Musoke versus Republic**, this principle was extended when the same court cited with approval a passage from the decision of the Privy Council in **Teper versus Republic (1952) AC 480** where it was held at page 489 that:-

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

Now, since it is agreed that the only evidence against the accused person is circumstantial, that evidence has to be interrogated from the foregoing perspective and the pertinent question is, in my humble view, whether the prosecution, first established certain facts and second, whether the established facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

John Wainaina Ndirangu (PW1) heard the deceased scream; there was evidence that of all the deceased’s family members’ houses, his house was the closest to that of the deceased. Rather than go to the deceased’s house or home, he opted to go the deceased’s parents’ home which was further away from where the deceased lived to inform them of what he thought was an unusual commotion from the deceased’s home. According to his evidence, he found the deceased’s brother **Ibrahim Kimani Thuo (PW2)** at his parents’ home; he asked him to go to the deceased’s home. He left and went back to his home.

Ibrahim Kimani Thuo (PW2) himself testified that he was not at his parents’ home as alleged by **John Wainaina Ndirangu (PW1)** but that he was on his way home together with his brother **Joseph Kariuki Kimani (PW3)** when they met **Ndirangu (PW1)**. Based on the information **Ndirangu (PW1)** gave them, they rushed to the houses of both the deceased and the accused person. They met the accused person at his gate; he was armed with a panga and he chased them away.

There was evidence that the accused person’s house and that of the deceased were separated by a distance of at least 50 metres; at least this is what I gathered from the evidence of **Ndirangu (PW1)**. The screams, according to **Ndirangu’s** evidence, were emanating from the deceased’s home. It was not clear from the evidence of **Thuo (2)** and **Kimani (3)** what they found out from the deceased’s house or home, if they went there as suggested in their evidence. What is clear from **Thuo’s** evidence is that they neither saw the deceased nor heard any screams.

Kimani (PW3), on the other hand, testified that they proceeded to the deceased’s house but they were chased away by the accused when they reached there. According to this witness, the accused was at the deceased’s home or house and not at his own home, which as noted was 50 metres away from that of the deceased.

There was an obvious contradiction in the testimony of **Thuo (PW2)** and **Kimani (PW3)**; while the former said that the accused person was at his gate and he could not allow them enter his homestead, the latter testified that the accused person was at the deceased's home and it is from there that he chased them away. The accused person could not have been at the two places at the same time; if the state case was that the accused person may have been the reason behind the deceased's screams, then it ought to have led consistent evidence, without any shadow of doubt, that the accused person was at the deceased's house where the screams were coming from.

I am minded that the deceased's father testified that both the accused and the deceased lived in the same compound but the evidence of his mother (**DW2**) that their sons lived in separate homesteads was unchallenged.

The evidence of **Thuo (PW2)** and that of **Kimani (PW3)** also contradicted that of the investigations officer **Benjamin Wambua (PW6)**. The latter, who recorded their statements, said that the two witnesses told him that they heard the deceased scream and say "do not kill me". None of the two witnesses ever said that he heard the deceased scream or say anything; indeed **Thuo (PW2)** was categorical that he neither saw the deceased nor heard him scream.

With the contradictions and inconsistencies in the prosecution testimony, it cannot be said with any sense of conviction that the state established a set of facts that are incompatible with the accused person's innocence and which are incapable of explanation upon any other reasonable hypothesis other than the accused person's guilt.

I am persuaded that the state has not discharged the burden of proving facts which justify the drawing of an inference of guilt on the part of the accused person. Inconsistencies and gaps in the prosecution case have left open the possibility of other co-existing circumstances which weaken or otherwise destroy that inference of guilt. In the absence of sufficient evidence against the accused person, I have come to the inevitable conclusion that he is not guilty of the offence of murder as charged and I hereby acquit him under **section 215** of the **Criminal Procedure Code, Cap. 75**.

Signed, dated and delivered in open court this 19th day of August, 2016

Ngaah Jairus

JUDGE