



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO 33 OF 2009

JOHN IKUYU KATHARE.....ACCUSED

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

JOHN IKUYU KATHARE faces a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge are that on 12/3/2009 at Kibuka Village, Tunyai Location, Tharaka District, he murdered Tabitha Kanyua. The accused denied the offence. The prosecution called a total of 6 witnesses while the deceased made a sworn statement in his defence.

PW2 Daniel Mchomba Muchiri, a resident of Tunyai recalled that on 12/3/2009, he went to Lino Muriungi's house, a neighbor (PW4). He found Kanyua the deceased, washing clothes. He had gone there with a jericane to draw water and also visit. There he found John Ikuyu, the accused, talking to Kanyua, asking her to return to their rented house. PW2 knew that Kanyua and Ikuyu lived together as husband and wife. PW2 said that Ikuyu called Lino Muriungi (PW4) aside, and they went to talk behind the house but he did not hear what they conversed. He went and sat under a mango tree and could not see Kanyua and Ikuyu as they were behind the kitchen. Later, he heard Kanyua screaming saying **"I have been stabbed, please remove it from me"** He then saw Ikuyu pass by and it is then he asked Ikuyu if he had stabbed somebody; that Ikuyu did not answer but instead started to run away. PW2 chased him and caught him about 150 meters away, he made accused fall down and he started to call for help. Muriungi (PW4) and Charles M'Linkanya went to assist Ikuyu and took him back to Muriungi's home. At the gate, they met Kanyua going out of the said home. PW2 followed Kanyua, he found her at Muchiri Kilimo's (PW3) home, a traditional doctor, which home was about 250 meters away. He heard Kanyua tell Muchiri to treat her because she had been shot with an arrow. At that stage, Charles M'Linkanya, Kambura Muriungi (PW5) and Ikuyu arrived. PW2 left to go and call the sub area. After the sub area arrived Muriungi (PW4) went to look for a vehicle but soon thereafter, Kanyua died. He called Administration Police (Aps) who went to the scene and guarded it till 8.00 am and police came to the scene and arrested Ikuyu while Kanyua's body was taken away to the mortuary. PW2 said that though the incident took place at night there was moonlight to see a person who was 20 meters away. PW2 said that he saw the injury on Kanyua whereby an arrow was lodged in her ribs.

PW3 Muchiri Kilimo who hails from Tunyai told the court that he is a traditional doctor (herbalist) and that on the night of 12/3/2009, he was asleep in his house when Kanyua woke him up and informed him that Ikuyu had stabbed her with an arrow. He went out and found she had fallen at his door. He observed that indeed she had been stabbed on the left side of the ribs. He touched the protruding part of the arrow that was still lodged in her body and then, some people arrived; that Kanyua moved a short distance away and died. He knew Ikuyu as husband to Kanyua and they had rented a house nearby.

PW4 Lino Muriungi Ndugutu of Tunyai recalled that on 12/3/2009, he returned home and found his wife, children and Kanyua and Charles M'Linkanya who were his employees; that at 8 00 pm, Ikuyu whose nickname was "Samakl" arrived at PW4's home and started pleading with Kanyua to go back home with him. PW4 said that Kanyua and Ikuyu were husband and wife and had disagreed. Ikuyu asked PW4 to plead with Kanyua to go back home with him but Kanyua refused. He said that Kanyua had slept at his home for 3 days because of the disagreement with Ikuyu. He went into the house and started watching TV and about 12.00 midnight to 1.00 am, his wife called him and told him that Kanyua had been stabbed with an arrow. PW4 went out and tried to pull out the arrow from Kanyua but failed. As he tried to remove the arrow, he heard screams and upon going where the screams emanated from, he found Mchomba (PW2) had thrown Ikuyu on the ground and PW4 got a rope to tie up Ikuyu. PW4 went to get a vehicle and on reaching PW3's home where Kanyua had gone for treatment, found she had died. He went to the Administration Police Camp AP with the Sub Area to get Aps. PW4 later attended the post mortem on the deceased's body.

PW5 Regina Kambura is the wife of Lino Muriungi (PW4). She told the court that Kanyua was her employee and on 12.3.2009 Ikuyu went to her home about 9.00 pm, he called Kanyua out and they started talking. Later, Kanyua told her that Ikuyu wanted them to reconcile but Kanyua said she was not ready to return to Ikuyu. PW5 said that Ikuyu and Kanyua had been living as husband and wife. She went to attend to her child who was crying as Kanyua started washing clothes. PW5 saw Muchomba (PW2) come to fetch water at her place and it is then she heard Kanyua calling her outside telling her that she had been stabbed with an arrow by Ikuyu. PW5 went out and Kanyua asked her to try to remove the arrow. At the same time, she heard Muchomba (PW2) ask Ikuyu whether he had stabbed somebody because he was running. PW5 called PW4 to come and help remove the arrow from Kanyua. PW5 heard Muchomba screaming and calling PW4 to take a rope and they brought back Ikuyu to her home. She followed Kanyua to PW3's home where she had gone for treatment. PW4 and the sub area returned with a vehicle but found when Kanyua had died. Ikuyu was rearrested by police who came to the home the same night.

PW6 PC James Nderitu of Marimanti Police Station is the investigation officer in this matter. He was asked by OCS CIP Mwangi to accompany him to the scene of the murder at Tunyai on 12/3/2009. They found the deceased's body in the home of Muchiri (PW3). He observed an arrow lodged between her ribs. They found Ikuyu under arrest and rescued him. PW6 learnt from the witnesses that Kanyua had declined to go back home with Ikuyu and he then shot her. PW6 attended the post mortem, took the arrow head removed from the deceased body to the government analyst. PW6 produced the Government Analyst Report in evidence (PEX No. 3) and the findings were that the arrow had the deceased's blood. The post mortem was conducted by Dr. Macharia and the post mortem was produced by Dr. Stephen Kibengo. The Doctor found that the deceased sustained a penetrating injury on the left hypochondrium 4 cm long internally 4 cm long, internally, the lung had collapsed haemothorax on left side of chest, a lacerated diaphragm with a head of an arrow in situ. The doctor opined that the cause of death was the penetrating chest injury caused by an arrow.

In his defence, the accused, John Ikuyu, testified on oath to the effect that on 12/3/2009, he was from work and on the way home he entered the home of Muriungi (PW4) to take alcohol, which he took till 2.00 am; that during that time, he sat next to his wife Kanyua, that at 2.00 am Muchomba (PW2) asked to use his phone but he refused; that PW2 took the phone by force. Accused snatched it back, and PW2 then hit him on the left cheek. He got annoyed, hit PW2 with the head, he fell and PW2 got up ran off; that PW2 stopped some meters away and threatened him. After about 10 minutes, his wife who was still with him said that she had been stabbed, he checked and found that she had been stabbed using an arrow. He tried to remove it but failed. He said that one Charles Rinkanya said it is Muchomba who had shot the arrow and ran off. It was then that he chased Muchomba, caught up with him and made him fall, snatched the arrow and people including Muriungi (PW4) arrived and alleged that he wanted to kill Muchomba because the wife was stabbed. They beat him, tied him up except Rakanya who tried to stop them in vain. When being beaten is when his wife Kanyua left for hospital, Kambura (PW5) took her to the herbalist, the father of PW2. When he went to PW3's house, he found she had died. He said that all witnesses are neighbours and related while he came from far off. He denied that Kanyua had left their home after a quarrel but that he had left her at home that morning. He said that he was framed because

he was not their friend and had come from far.

After the close of defence case, Mr. Murithi, counsel for the accused submitted that nobody saw the accused commit the offence; that there was no confrontation between accused and deceased and the circumstantial evidence does not irresistibly point to the accused as the offender. He urged the court to treat the dying declaration with caution making reliance on the case of **REPUBLIC V M. G. CRC 12/2003 (MBA)** where it was held that a dying declaration made in absence of the accused should be taken with caution. Mr. Mungai, Learned Counsel for the State submitted that this was a case of recognition, all witnesses being neighbours; that accused was at the scene of crime and had been with deceased shortly before she was shot and he was arrested at the scene.

He also submitted that it is not mandatory that an accused be present when a dying declaration is made in order for it to be acceptable.

I have considered the evidence by the prosecution, the defence and submissions by both counsels. The prosecution witnesses PW2, 3, 4 and 5 all knew both accused and the deceased. They knew them to be cohabiting as husband and wife. The accused confirmed in his defence that the deceased was his wife.

It is also not in dispute that on the fateful night, 12.3.2009, the accused was at the home of PW4 Lino and PW5 Kambura. The accused admitted that fact. The only point of departure is what was going on at the said home and how did the deceased get to be injured, which I will consider later on this judgment.

The other undisputed fact is that all the prosecution witnesses PW2, 4 to 5 are all people who know each other as neighbours and also knew the accused and the deceased.

There is also no dispute that the deceased met her death after she was shot by an arrow while at PW4, 5's home. PW2, 4 and 5 told the court that they all tried to remove the arrow that was lodged in the deceased's body. Dr. Kibengo removed the arrow that was still lodged in situ and found that it had lacerated the diaphragm, injured the left hypochondrium with a collapsed lung and haemothorax in the chest. The doctor opined that the injury caused by the arrow was the probable cause of death. The question that this court has to answer is who shot the deceased.

PW2, 3, 4 and 5 and accused all testified that this incident occurred at night. Nobody actually saw who shot at the deceased. This case therefore entirely rests on circumstantial evidence.

The law on circumstantial evidence is now settled. In fact it is said to be the best evidence because it entails the examination of the surrounding circumstances which is capable of proving a case conclusively. See **R. VS TAYLOR WEANES AND DONOVAN (1928 21 CAP R. 20** which was cited in **REPUBLIC V. M. G. CRIMINAL CASE NO. 12 OF 2003**. See also **MARGARET WAMUYU WARIOKA V. REPUBLIC CRA 35/2005**. Most Kenyan courts have followed the decision in **R. V. KIPKERING ARAP KOSKEI AND ANOTHER (1949) EACA 135** where the court held that in order to found a conviction on circumstantial evidence the inculpatory facts must point to the guilt of the accused person and must be incompatible with the accused's innocence and incapable of explanation upon any other reasonable hypothesis other than that of his guilt. The court of appeal in the case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** stated that the prosecution must establish three criteria in order to found a conviction on circumstantial evidence. The court stated:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- 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 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.”

It is necessary that the court examine the circumstantial evidence thoroughly, so that the court is sure that it is not fabricated nor should any doubt be left in the court's mind. It is also necessary that before drawing an inference of the accused's guilt from the circumstantial evidence, the court should be clear in its mind that there are no other co-existing circumstances that would weaken that inference. As stated earlier, all the witnesses PW2 to 5 including the accused were in PW4 and 5's home on the fateful night. It was in the night about 2.00 am. PW2, 4 and 5 all told the court that on that night, Kanyua was washing clothes as accused talked to her just before she was injured. According to PW 4 and 5 the deceased had disagreed with the accused and she had been putting up at their home for 3 days prior to the day of the attack. All the three witnesses PW2, 4 and 5 all told the court that the accused tried to persuade the deceased to return to their home but she declined. PW4 and 5 also said that on that night, accused also asked them to plead with the deceased to return to their house but she refused. Their evidence was so consistent that I have no doubt that they told the court the truth as to what happened before the deceased was injured. The evidence of the three is more believable than accused's defence that he had gone to drink alcohol at PW4's home and only found the wife there. Even if there was alcohol being taken, in that home, which I suspect it was, the accused went there for a mission, that is, to get his wife (the deceased) to go back to their house but she refused. Accused did not explain how the wife got there if indeed he had gone to drink. That must have been the cause of the attack. PW2 told the court that he left accused and deceased talking and went to sit under a tree and that he did not see who stabbed the deceased but he saw accused pass by him as the deceased screamed for help and that accused ran off when he asked whether he had injured somebody. PW4 said that when PW5 called him from the house to come and assist the deceased he heard screams about 150 meters away and ongoing there, found PW2 holding the accused. PW5 told the court that when the deceased called her from the house saying she had been stabbed, at the same time she heard PW2 ask accused if he had stabbed somebody and heard PW2 call for help from PW4. PW5 corroborated PW2's evidence that on hearing screams she came out of the house and saw the accused running away and PW2 was chasing accused. She also found PW2 holding accused. I am satisfied that the evidence of PW 2, 4 and 5 was consistent as to what happened on that night. It is PW2 who chased accused from PW4 & 5's home after the deceased was injured. It was not the reverse, i.e. what accused said that he is the one who chased PW2 is untrue. The accused had been seen talking to the deceased trying to convince her to return to their house. He was then left in deceased's company. Under section 111 of the Evidence Act, accused has a duty to explain what happened to the deceased. His explanation that she was shot by somebody else is not true in light of the overwhelming evidence by PW2, 4 and 5. Even if it was night, there is no dispute that accused was at the scene for the reasons stated above and I have no doubt that PW2, 4 and 5 have told the court the truth. Accused had reason to attack the deceased because she had refused to go back to accused's house. In his defence, the accused alleged that Rinkanya told him that it is Muchomba, PW2 who shot the deceased. Unfortunately Rinkanya had not been called as a witness and there is no requirement that the prosecution call present. However, at no time during the prosecution case and cross examination of witnesses had accused alleged that Rinkanya told him that it is an afterthought.

PW2, 3, 4 and 5 all told the court that the deceased told them that it is accused who had stabbed her. The deceased walked to the home of PW3 in company of PW5. PW3 told the court that deceased told him that accused stabbed her. She also told PW4 and 5 that the deceased told her that it is the accused who had stabbed them. In arguing that he met the deceased told the witnesses was a dying declaration. Mr. Murithi relied on the case of **REPUBLIC VS M. G. MSA HCR 12/2003** where J. Maraga cited the case of **KIHARA V. REPUBLIC (1986) KLR 473** on the circumstances that the court should consider in relying on dying declaration. The court said:

“Though there is no rule that dying declaration must be corroborated, the court needs to caution itself that in order to obtain a conviction on a dying declaration it must be satisfactorily corroborated (Republic V. Said Abdalla (1945) 12 EACA 678). Particular caution must be exercised as to when and where the attack took place and also about the identification of the assailant and weapon used. It may be that the dying person may not

remember all that and may not be telling the truth” (page 476 to 477)

In **Aluta V. Republic (1985) KLR 543** the court of Appeal against said

“A trial judge should approach the evidence of the dying declaration with necessary circumspection. It is generally speaking very unsafe to base a conviction solely on the dying declaration made in the absence of the accused and not subject to cross examination unless there is set factors of corroboration.”

In summary the courts have held that a dying declaration must be considered with utmost care and be corroborated.

In the instant case, the dying declaration does not stand alone. I find that the dying declaration was made to 4 people and is also sufficiently corroborated by the evidence of the 4 witnesses on what transpired on the said night before the deceased was shot. It was also not said in absence of accused because the accused did not escape from the scene and was even taken to PW3’s home where the deceased had told PW3 that the accused stabbed her. The witnesses to whom the dying declaration was made were also put to cross examination. In my view, the dying declaration was sufficiently corroborated as required in such a case.

Accused stated that he was framed because he lived far and was not known to the witnesses who were neighbours. I do not believe that was reason enough to frame the accused. First of all, accused agreed to have gone to drink alcohol at the said home and it turned out that his wife was also there. In my view, it cannot be a home where he was a stranger. I believe he was known in the home and he was welcome. What he told the court was not good enough reason to frame him for this offence. The defence is but a denial and an attempt to shift blame onto somebody else who had no reason to commit such an act. On the other hand, the accused had all reason to commit the offence because the deceased had refused to go back to their home.

I have found the evidence of the prosecution witnesses PW2, 3, 4, 5 and 6 so consistent in all material particulars considered above that I have no doubt that they told the court the truth.

In the end, I am satisfied that the prosecution has proved beyond any doubt, that it is the accused who shot his wife with an arrow and caused her death. Malice aforethought flows the use of an arrow as a weapon. It was aimed at a vital organs of the body which I believe intended to cause fatal injuries. The circumstantial evidence on record unerringly points to accused as the culprit and there are no weaknesses in the chain of events is so complete that there is no doubt that it is the accused who shot his wife with an arrow and caused her death.

I find him guilty as charged under section 203 of the Penal Code and convict him under section 322 CPC.

DATED AND DELIVERED AT MERU THIS 20th DAY OF FEBRUARY 2015.

R. P.V. WENDOH

JUDGE

Mr. Murithi for accused present

Ms. Kigira for State

Jane Court Assistant