



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 73 OF 2010

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

GEORGE KIMANI WARUIRU.....ACCUSED

JUDGMENT.

1. The accused person GEORGE KIMANI WARUIRU is charged with two counts of Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the first count are;

“On the night of 4th and 5th September, 2010 at Muthure village, in Kikuyu District, within Central Province, murdered MARTIN KARANJA WARUIRU.”

2. The particulars of the second count are;

“That on the night of 4th and 5th September, 2010 at Muthure village, in Kikuyu District, within Central Province, murdered EVANSON KANJA WARUIRU.”

3. The prosecution called eleven (11) witnesses. The prosecution case is that the accused person was the youngest brother of the two deceased brothers in this case.
4. The facts of this case are that on the night of 5th September 2010, between 2 and 3 a.m., PW2 who is the mother of the accused and the deceased persons heard banging on the door of her deceased son Evanson. Evanson was her eldest son and was paralysed and bed ridden following a road accident. He lived in a house next to hers. PW2 always locked Evanson in his house for the night after feeding him.
5. PW2 woke up and went out to check her son Evanson only to see blood all over. She heard her son Evanson say **“Mum, help me it is Kim”**. PW2 started screaming. PW2 claimed in her evidence that after PW1 who is her nephew came to her aid, she asked him to go and look for a vehicle to take Evanson to hospital. PW2 testified that immediately after that she fainted and she does not know what followed.
6. PW1 ran to look for a taxi only to return later to find that Evanson had died. PW1 testified that when he went in to check on Evanson he saw that his intestines were sticking out. PW1 decided to look for Martin, Evanson’s brother in his house which was not far from Evanson’s home. He found the house locked. PW1 decided to ran to Martin’s hotel where he found Martin lying dead on the floor of the kitchen. He then called the Assistant Chief of the area, PW5 and eventually proceeded to the hotel.

7. PW3 was an uncle of the accused and the deceased persons, and a step brother of their father. PW3 testified that he was woken up by one of his brothers on the night in question only to find Evanson dead in his bed. When PW1 came back with the taxi PW3 rode in the same taxi and proceeded to Kikuyu Police Station where he made the report of the incident. He released the taxi man to go and fuel his vehicle. Five minutes later, the taxi man returned and reported that he had seen the accused person within the town. That is when PW3 together with the OCS Kikuyu Police Station, together with other police officers including PW6 and PW7 boarded the vehicle but as they drove out of the station they spotted the accused walking towards the Police Station. PW6 and 7 arrested the accused person.
8. According to PW3 the accused declared **“the knife I have killed Biston and Mackey with I have thrown at Kanyariri cemetery”**. PW3 testified that Biston was the popular name for Evanson while Mackey was the nickname for Martin. He said that by the time the accused person told them that Martin was also dead neither PW3 nor the police officers had information of his death.
9. PW3 testified that one day before this incident, on the 4th of September, the accused person found him outside his compound at about 11 a.m. He said that the accused told him that he was annoyed and that he would do something. PW3 stated that he promised the accused that they would talk about that later. Unfortunately, they never had that discussion that day and that it was during that same night that the two brothers were murdered.
10. PW9 took from the accused his sport’s shirt and pair of shorts P. exhibits 3 and 4 which were blood stained. PW9 also obtained blood samples of the two deceased brothers from Dr. Oduor who performed the post-mortem on both of them. He also took the knife which was recovered from Muthure cemetery by himself, the OCS and PW5 the Assistant Chief. The knife was P. exhibit 2. He gave all the samples, the clothing and the knife to the investigating officer PW11.
11. PW11 sent the exhibits and the blood samples of the deceased and also of the accused person to the Government Chemist for analysis. Dr. Paul Kangethe who has since retired carried out the analysis. His report was P. exhibit 8 and was produced by his colleague PW10. After the analysis and the DNA profiling Dr. Kangethe concluded that the blood sample indicated to be from the deceased Evanson generated a DNA profiling which resembled the DNA profiling of the blood stains found on the knife, and the trouser shorts indicated to be of accused.
12. Dr. Oduor who performed the post-mortem on both the deceased persons was not available to produce the post-mortem results. Dr. Ndegwa, PW8 did so on his behalf. In the report on the post-mortem carried out on the body of Martin, Dr. Oduor found two stab wounds on the right neck, five stab wounds on the chest and four stab wounds on the abdomen. Internally there was bleeding in the chest cavity and also in the abdomen. The cause of death was found to be multiple injuries due to penetrating trauma to the chest and the abdomen.
13. On the body of Evanson, the Doctor found two stab wounds on the chest, four stab wounds in the abdomen and one stab wound on the right side of the neck. Internally both lungs had collapsed and there was bleeding in the chest and in the abdominal cavity. The cause of death was multiple injuries due to penetrating force trauma.
14. The accused person was placed on his defence and he gave a sworn statement but called no witnesses. In his defence the accused said that the two deceased Martin and Evanson were his brothers. He said that on the 4th of September, he woke up as usual and because he had no casual labour to go and do that day, he worked within the home up to 4 o’clock when he proceeded to St. Anne’s Catholic Church Muthure for choir practice. He stated that after the choir practice he proceeded to Muthure shopping centre to take soup and thereafter as he walked home while at Muthure stage a vehicle stopped and three men alighted, apprehended him and threw him inside their vehicle. He said that he thought they were police officers and on entering and sitting he realized they were not.
15. The accused stated that his hands were tied with shoe laces and was driven to Gitaru shopping centre. He stated that the people in that car told him that his brothers were members of mungiki and all they wanted him to do was to call his two brothers to them. He said that the people were seven (7) and that he feared for his life and therefore decided to do as directed. He said that at 1.30 a.m. he led the seven (7) men to his brother Martin’s hotel. He said that he called out his brother Martin who opened the hotel. He said that on seeing five of the men who had gone to the hotel door, his brother suggested that they discuss which the five flatly refused. The accused

- stated that three of them stabbed his brother in his presence an act he described as inhuman.
16. The accused stated that he took the seven men to his brother Evanson's house where he called him out. The accused stated that his brother Evanson switched on his electricity lights without saying anything. He then saw two of the seven men break the door and enter Evanson's house after which he heard his brother screaming and calling his mother. The accused stated that the two men and he entered the vehicle and that it was driven to Gitaru flyover where he was abandoned after being told that the time for his death was not yet. He said that he proceeded to Kikuyu Police Station where he found three police officers. He stated that he reported that his brothers had been killed by Mungiki. He said that one police officer told him that he was mad while the other two chased him away after beating him. He said that on his way from the police station he met two personal vehicles. From one vehicle three Administration Police officers alighted. From the other vehicle PW3, 4, 5 and 6 alighted. He said that nobody waited for any explanation from him and that instead he was handcuffed on both legs and hands and bundled in the boot of the vehicle. He said that the next time the boot was opened he was at Kikuyu Police Station. He said that he spoke with the investigating officer and three other police officers to whom he narrated what had happened after which they told him they could not help him but that it was the court which would decide his fate. The accused concluded by saying that he did not know the identity of the men who stabbed his brothers.
 17. This case was heard by Hon. Mwilu, J. as she was then who heard the evidence from PW1 to 4. Hon. Muchemi, J. took over the case and heard the evidence for PW5 to 7. I then took over the case under **section 201 (1)** and **section 200** of the **Criminal Procedure Code**. The accused person opted to have the case proceed from where the previous judges had left it.
 18. The prosecution of the case was conducted by several prosecutors. However, when the matter was taken over by my court, Ms. Maari prosecuted the case to the end. Ms. Odembo defended the accused throughout this trial.
 19. Ms. Odembo in her submission both written and oral urged that the prosecution called nine witnesses, which is incorrect because they were eleven. In her submission, she asked the court to find that the prosecution failed to prove its case beyond any reasonable doubt and also urged that there was no eye witness, that the prosecution did not prove *mens rea*, *actus reus*, and malice aforethought. Counsel also urged that the prosecution did not show whether the offence was committed on the 4th or the 5th of September 2015 (sic). Counsel further urged that the motive of murder was not demonstrated since none of the family members testified of the existence of any grudge.
 20. Regarding a confession, Ms. Odembo submitted that none was produced in evidence. Counsel added that if there was any confession adduced in evidence she wondered whether it complied with the provision of **section 25A** of the **Evidence Act**. Finally, Ms. Odembo urged that that if at all the accused stabbed his brothers and no reason was tendered to the court as to why he would do such a thing, the police should have taken the accused for proper psychiatric examination. For that proposition, the counsel relied on a Mombasa High court case **Rep. Vs. Michael Robel [2013] eKLR High court HCCR No. 6 of 2010**. In that case the court held that:

“The only way this court would have been able to know the nature and the extent of the mental incapacity of the accused and whether such mental incapacity may have in any way affected his actions prior to his arrest would have been through expert medical testimony adduced from the psychiatrist. However, the psychiatrist was never re-called to expound further on his findings. In my view this was remiss on the part of the prosecution. The psychiatrist made an initial finding that accused was of unsound mind. Later a report dated 1st December, 2012 indicated that the accused was fit to plead. The prosecution ought to have re-called the psychiatrist in order to expound on these findings. As it is the possibility that the accused was in an unsound state of mind during the time of the incident, has not been excluded. Doubt has arisen regarding the mental status of the accused. It is worth repeating that the onus lies squarely on the prosecution to prove that at the time of the incident the accused was of sound mind and was capable of formulating the malice aforethought required to prove the offence of murder. In my view the prosecution have failed to prove this aspect of the offence to the required standard in law. Once again the benefit of doubt

must be awarded to the accused. Based on the foregoing I find that the state have failed to prove this charge beyond a reasonable doubt. I therefore enter a verdict of “Not Guilty” and accordingly I acquit the accused. Accused is to be set at liberty forthwith unless otherwise lawfully held.”

21. Ms. Tumaini Wafula, Learned Prosecution Counsel submitted that the prosecution has adduced evidence to prove that the accused person had malice aforethought. Counsel submitted that the accused went to PW3's home on the fateful day and told him that he was not happy with his brothers and family and that he would do something very bad. Just to correct that statement, from the record of the proceedings the accused person told PW3 that he was annoyed and would do something without mentioning why he was annoyed or the nature of the thing he would do.
22. Ms. Wafula submitted that the murder weapon was also recovered from a cemetery where the accused led PW5 and 6. The Learned Counsel submitted that the knife and the blood stained clothing of the accused were all taken to government chemist and found to have blood which matched the blood from both deceased. Just to correct that submission, the blood stains on the knife and on the accused trouser shorts was found to match with the DNA profiling of the blood from the deceased Evanson alone.
23. In regard to the defence, Ms. Wafula urged the court to find that the accused claims that he was kidnapped and driven to the deceased persons where they were stabbed to death is a fiction and should be rejected.
24. I have carefully considered the evidence adduced both by the prosecution and the defence in this case. I have also considered the submission by both counsels in the case. There are facts which are not in dispute. It is not in dispute that the accused and the two deceased in this case are brothers, the accused being the youngest and the deceased Evanson being the oldest. There is no dispute that PW2 was their mother. There was no dispute that Evanson was paralyzed as a result of a road accident. There was no dispute that all the three brothers lived with their mother in the same compound but in separate houses.
25. The issues in this case from what has been submitted before me are:
 - a. **Whether the accused caused the death of the deceased?**
 - b. **Whether the accused was of sound mind at the time of the incident?**
 - c. **Whether the prosecution has established malice aforethought?**
 - d. **Whether the accused made a confession to the offence, and if so whether it is admissible in evidence?**
26. The burden lies upon the prosecution to prove the charge against the accused person beyond any reasonable doubt. The prosecution must adduce evidence to establish that it is the acts of the deceased as a result of which the two deceased or either of them were wounded, and that their death was a direct result of the injuries the accused inflicted on them. The prosecution must adduce evidence to prove that at the time the accused person injured the deceased, he had formed the necessary intention to cause death or grievous harm to the deceased persons.
27. **Section 203** of the **Penal Code** which creates the offence of murder prescribes as follows:

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

28. Malice aforethought is defined 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.”

29. There was no eye witness of the attack on the deceased persons. The deceased Evanson was attacked in his home. The latch to the door of his house was broken with the padlock intact. That latch was photographed at the scene of incident by the Scenes of Crime Officer, and produced in court by the investigating officer, PW11 as P.exhibit 9. The photographs were also produced by PW11 as P. Exhibit 5. PW2 testified that she heard the banging on the deceased Evanson’s door and the break in. By the time she went out to check on him, the deceased was fatally stabbed. He was however still alive and he spoke to his mother, PW2 and told her to help him as “Kim” had stabbed him.
30. The issue is whether that statement by Evanson is a dying declaration? In **CHOGE -V- REP[1985] KLR 1** the court of appeal observed as follows:

“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at a point of death and the mind is induced by the most powerful consideration to tell the truth. There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.”

31. Did Evanson make the statement in extremity; was he at the point of death and the mind induced by the most important consideration to tell the truth? I believe the statement by the deceased Evanson qualifies as a dying declaration. It was made by him shortly before he died. He was therefore at the point of death. I am satisfied that at the time Evanson made the statement, he was at the point of death and his mind at that moment was strongly induced to tell the truth. The statement was a dying declaration, and therefore though hearsay evidence falls within the exemption rule and is therefore admissible in evidence.
32. The question then is whether the person implicated in Evanson’s statement was the accused? PW2 in her evidence stated that she did not know who the deceased meant by the name Kim as there were many people in the village with that name. PW1 and 3 who went to PW2’s rescue when she started screaming following the incident testified that at the time, PW2 stated categorically that it was the accused that stabbed the deceased Evanson. To PW5 the Assistant Chief PW2 told him that the accused had killed both his brothers Martin and Evanson. Regarding the name Kim, both PW3 and PW5 stated that the accused was commonly known as Kim and so any mention of that name Kim meant the accused.
33. PW1, 3 and 5 had no reason to make such a serious allegation that PW2 told them that it was the accused that stabbed Evanson. I noted from the notes of Mwilu, J. as she then was, that at the time the Hon. judge concluded taking down PW2’s evidence she observed that PW2 was taking so long to answer questions and that in her view she was most dishonest. That being the observation of the preceding judge, I am bound by the same.
34. I have tested PW2’s evidence against that of the rest of the witnesses; one cannot fail to notice that PW2 exaggerated certain facts. For instance PW2 claimed she lost consciousness the moment PW1 came to her home and after sending him to get a taxi. She stated that she did not know what happened after PW1 left. Yet PW5 and 3 who came much later after PW1 talk of PW2 being awake, alert and crying from her loss from the time they first saw her after the incident to the time Police went to the scene.
35. The fainting theory was therefore made up. It must have been intended to prevent much enquiry of the events of that day from the witness. Her evidence that she did not know who Evanson meant by Kim was also a lie. One need not look far to know why. PW2 was definitely trying to save the accused, her youngest son from the responsibility of what he had done. I will get back to this later.

36. The other evidence against the accused was a veiled threat he made to PW3, his uncle. During the day before the night of this incident, the accused went all the way to PW3's place and informed him that he was annoyed and that he would do something. Even though the accused was not specific, it is clear from the statement that he was annoyed that the something he threatened to do could not have been a good thing.
37. In his defence, the accused did not say he made any statement to PW3 along the lines that PW3 said. Under **section 111(1)** of the **Evidence Act**, the accused has a statutory burden to explain facts which are within his knowledge. It stipulates 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."

38. It was within the accused knowledge what he meant with the statement he made to PW3. The accused had a burden to explain that statement but he chose neither to deny he did not make such a statement, nor did he explain what he meant. I find that the statement he made to PW3 was a threat that he would do something due to anger. I note that after the statement was made, the deceased brothers were murdered less than 24 hours later. I find that the statement establishes that the accused had motive to commit a serious act.
39. The other evidence against the accused was the fact upon DNA profiling the trouser shorts the accused was wearing that day was found to have blood of the same DNA profiling as that of Evanson. The Government Analyst who conducted the analysis concluded that the blood on the accused shorts was that of the deceased Evanson.
40. The accused defence was that he was hijacked by seven men who demanded that he takes them to his brothers Evanson and Martin. The accused stated that he first person he led them to was Martin. The accused said that Martin was murdered by three men as he watched. He said that he then took them to Evanson where they broke into his house and two of them murdered him. It was the accused defence that he first called Evanson and that without answering. Evanson switched on the electric lights. It was then that the door to his house was broken into and he was stabbed.
41. I noted that the accused admits that the lights to Evanson's house were on and that Evanson was awake at the time he was stabbed. Evanson had sufficient light and opportunity to see his attacker. Evanson's dying declaration was therefore safe as the deceased was able to see who attacked him. The accused was his brother and he knew him well. The conditions of lighting at the deceased Evanson's house, the scene of the attack on him were good for a positive identification of his attackers. I find that the deceased Evanson's dying declaration is admissible and that it irresistibly pointed at the accused as the one that stabbed the deceased Evanson leading to his death.
42. The accused defence that he had nothing to do with the stabbing of Evanson cannot be true. From his defence he stood a distance as strangers stabbed his brother, yet his shorts were found to have Evanson's blood on them. I find that there is no other explanation of how deceased Evanson's blood came to be on the accused shorts except due to the fact he is the one who stabbed the deceased Evanson and in the process blood spilt on to his clothing.
43. There was an admission made to PW3, 5, 6 and 7 to the effect that the knife the accused used to stab his two brothers was at a cemetery. Indeed a search at the cemetery by PW6 and 7 yielded positive results. Ms Odembo challenged that statement on grounds it did not comply with section 25A of the Evidence Act. I do not wish to belabour this issue save to say that except PW3, the rest

of the witnesses the accused made the admission to were Police Officers and Area Assistant Chief. These were people in position of authority. What the police should have done is to take down the admission in a statement under caution as provided under **section 25A** of the **Evidence Act**, after which the recovery of the knife should have been made. No such attempt to record a statement was made. The three witnesses, the Assistant Chief, PW5 and the Police Officers PW6 and 7 were also not qualified to take a statement under caution from the accused person. In the circumstances I find that the admission together with the evidence of recovery is in the circumstances inadmissible in evidence.

44. As stated earlier the evidence against the accused is that of circumstantial evidence as we have no direct evidence of the attack. We have the dying declaration; the presence of deceased Evanson's blood on the accused clothing and the threat the accused made to PW3 at 11am before the night the deceased were murdered.
45. The Court of Appeal in **KARIUKI KARANJA VS REP[1986] KLR 190** stated as follows regarding circumstantial evidence:

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”

46. In the case of **KIMEU –VS- REPUBLIC** (2002) 1KLR 756, the Court of Appeal held as follows:

“The court can only act on circumstantial evidence to support the conviction of an accused person if the evidence points irresistibly at the accused's guilt to the exclusion of everybody else.

Before drawing the inference of accused's guilt from circumstantial evidence, the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference of guilt of the accused.”

47. I am guided by these two cases. I have scrutinized the circumstantial evidence against the accused in this case. I have also cautioned myself of the need for care in receiving and relying on such evidence. I find that the circumstantial evidence adduced in this case irresistibly points at the accused person as the one who committed the murder against Evanson. I have considered the co-existing circumstance that may weaken the inference of guilt in the form of accused defence that he was hijacked by others who are the ones who murdered the deceased; and the fact that only Evanson's blood was found in accused clothing and not that of Martin. Having done so, I am satisfied that it is the accused that stabbed his two brothers on the fateful night. The threat he made to PW3 the same day of the incident rules out any possibility that he was hijacked or that the acts of stabbing were by other people and not him.
48. Considering the doctor's finding at post mortem, the stabs on both deceased were exactly the same in terms of the parts of the body the deceased were stabbed. The number of stabs inflicted varied slightly. This is indicated elsewhere in this judgment. It is clear the injuries were similar, and in both cases the deceased suffered collapsed lungs, bleeding in the chest and abdomen and multiple injuries to internal organs. I don't want to say it was the action of one person as that would be conjecture. However I do find that the similarity in the two attacks is glaring.
49. I find that even though there is absence of a dying declaration by Martin, given the threat accused made to PW3's hearing, and the presence of deceased Evanson's blood on his clothing that no one else could have committed this offence except the accused.
50. I find that the prosecution has adduced evidence to establish that the accused had a motive for this attack. I also find that the accused was in the process of surrendering to the police when PW6 and 7 arrested him. All these are proof beyond any reasonable doubt that the accused and no one else had the motive and the opportunity to commit these offences.
51. Having carefully considered the evidence adduced by both sides, I reject accused defence, find the charge of murder contrary to **section 203** of the **Penal Code** proved beyond any reasonable doubt.

DATED AT NAIROBI THIS 29th DAY OF OCTOBER, 2015

LESIIT, J.

JUDGE.