



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 36 OF 2013**

**LESIT, J.**

**REPUBLIC ..... PROSECUTOR**

**-VERSUS -**

**JOHN MACHARIA KANJA ..... ACCUSED**

**JUDGMENT**

1. The accused **JOHN MACHARIA KANJA** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

***“On the night of 25<sup>th</sup> and 26<sup>th</sup> day of December, 2012 at Kiambu Township within Kiambu County, jointly with others not before court murdered MICHAEL KAMAU.”***

2. The prosecution called a total of 13 witnesses. The facts of the prosecution case were that the deceased and his two brothers George Kimani PW8 and Peter Kimani PW1 converged at PW8's place of work along Grogan Road. It was 25<sup>th</sup> December 2012 at about 6.30 p.m. The three of them drove to Kiambu Township in Peter's vehicle. PW8 and Peter left the deceased sleeping inside the vehicle. Peter parked it outside Icon Club before both entered the club.
3. After half an hour PW8 asked Peter to check on the deceased in the vehicle. He returned to say that the deceased was still sleeping. At few minutes past 9 p.m. Peter went out to check on the deceased. He returned shortly later and reported to PW8 that the deceased was no longer inside the car.
4. As PW8 and Peter checked outside the club for the deceased, Peter received a call. He then told PW8 that it was Michael, the deceased who was saying that he had gone to Ndumberi and that he had no money. After calling boda boda operators they knew in Ndumberi to look around for the deceased, and failing to get a positive response Peter and PW8 drove there in Peter's vehicle.
5. The two brothers did not see their brother in Ndumberi. They could not reach him on phone either. They decided to go home and sleep. They did not find the deceased at home.
6. The next morning the deceased was found dead behind Icon Club in Kiambu Town. His shirt and coat were strewn near his body. He had an injury on the back of the head and was bleeding from the head and mouth.
7. The cause of death according to Dr. Njeru, PW10 was a head injury caused by a blunt object. The Report was P.Exh.3.
8. The investigating officer of this case PW12, asked for Safaricom Data for several handsets and lines. The first was on deceased handset Nokia 1112. The Data P.Exh.6 shows that the hand set

- was paned with an unregistered line 0703114665 between 29<sup>th</sup> December, 2012 to 6<sup>th</sup> January, 2013. That line was found in a phone Airtel which was recovered from the accused on 23<sup>rd</sup> February 2013, the day the accused was arrested. PW13 placed the accused in cells after booking him in the OB on 23<sup>rd</sup> February 2013.
9. The other lines found paned with deceased hand set included [particulars withheld] registered in the name of Joseph Kariuki Njenga. This was PW4. The Nokia 1112 was recovered from PW4 on date of his arrest on 21<sup>st</sup> February 2013. His evidence was that the phone Nokia 1112 was sold to him by one Ann Wanjiru a girl friend of the accused.
  10. The other line paned with deceased handset was No.0718490669 registered in name of Bernard Nyambura of ID No.26353686 between 6<sup>th</sup> January, 2013 to 7<sup>th</sup> January, 2013. He was never found.
  11. The accused was placed on his defence. He put forward an alibi and said that on 24<sup>th</sup> December 2012 at 4 p.m. he left for his parents' home in Naivasha where he remained until early January 2013 when he returned to Kiambu.
  12. The accused stated that on the 23<sup>rd</sup> February 2013, his girlfriend Anne Wanjiru Mwangi visited him at his place. She asked him to accompany her to Kiambu police station where her brother was being held. On the way to the station, accused said that Anne asked him for his phone Altel which he gave her.
  13. He stated that Anne removed his line and inserted hers. She then entered the police station. The accused stated that he was arrested. He admitted to the police officer that Altel phone the officer had was his but denied knowing anything about a Nokia phone the police showed him. The accused said that it was not the first time for him to give his phone to Anne.
  14. I have considered the evidence adduced by the prosecution and the defence in this case. The charge against the accused is murder contrary to **section 203** of the **Penal Code** which provides:

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

15. Malice aforethought is an integral ingredient to the charge of murder. **Section 206** of the **Penal Code** sets out conditions which constitute malice aforethought in the following terms:

**“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.”**

16. The accused was represented by Mrs. Nyamongo while Mr. Konga, prosecuted the case on behalf of the State.
17. Mrs. Nyamongo in her submission raised concerns of lack of full disclosure by the family of the deceased about any issues the deceased had which led them to lock him inside the vehicle and eventually panic when the deceased disappeared from it. Counsel urged court to consider the fact the deceased phone was not recovered from the accused and further fact it was not produced in court.
18. Mr. Konga in his submissions urged that the prosecution had proved that the accused was the first

- person to use the deceased phone four days after the deceased was murdered. Counsel urged that PW4 who was arrested with the deceased's phone explained that he bought it from one Anne a girlfriend of the accused.
19. The prosecution has the burden of proof in this case. It must adduce evidence to prove that the accused hit the deceased on the head causing him serious injuries from which he died. The prosecution must prove that at the time the accused hit the deceased, he had formed the necessary malice aforethought to cause either death or grievous harm to the deceased.
  20. The prosecution is relying on the doctrine of recent possession to the effect that the accused used the phone stolen from the deceased four days after it was stolen from the deceased at the same time when the deceased met his death.
  21. The prosecution has proved that the deceased phone was recovered from PW4 on 17<sup>th</sup> February 2013, about 2 months after the deceased died. PW4 in his evidence stated that he had taken the phone from one Anne Wanjiru. PW4's evidence was that Anne Wanjiru lived with the accused in the same plot where he himself lived, so he knew both well.
  22. As to how he got the phone PW4 testified that Anne sold the phone to him at KShs.700/=. PW4 also stated that at the time he paid Anne for the phone, she informed him that she had gotten the phone from the accused.
  23. The evidence of PW4 that one Anne got the phone in question from the accused is hearsay evidence and is inadmissible to be used against the accused for the simple reason that Anne was not called as a witness.
  24. It is Anne who should have been called to testify as to the source of the phone in question. Without her testimony PW4's evidence as to the source of the phone is hearsay and worthless piece of evidence against the accused.
  25. Anne Wanjiru was arrested together with PW4 and the accused. She was subsequently released after she recorded a statement as a witness. The prosecution did not call her as a witness. Failure to call Anne as a witness I denied the prosecution an opportunity to adduce evidence to create a nexus between the accused and the phone said to be that of the deceased.
  26. In **BUKENYA & OTHERS Vs. Uganda 1972 EA 549** where LUTTA Ag. VICE PRESIDENT held:

***“The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***

***Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.”***

27. I am guided by this case where the prosecution fails to adduce sufficient evidence to establish the truth in its case. The court is entitled to draw an adverse inference that had the witness(es) been called their testimony would have rendered to be adverse to the prosecution case.
28. Failure to call Anne meant that we have no cogent evidence to establish that the deceased phone was ever in the hands of the accused person because the person with that information was never called as a witness. Calling Anne in this case was not optional but mandatory. Her evidence was vital as it was the only link between the accused to the deceased phone.
29. Furthermore, calling Anne was vital to give the defence a chance to cross-examine her and test the veracity of her testimony. Without her the information she gave PW4 and the police remain mere allegations without substantiation.
30. The accused has put forward an alibi as his defence. He has admitted that a phone make Altel which police took away belonged to him. He explained that the police got the phone from Anne Wanjiru who had taken it from him. It was accused contention that not only did Anne take (that) his phone from him minutes before she gave it to the police, she also removed his line and inserted hers.
31. The line found in the Altel phone which Anne gave the police, is the same one which PW11, the Safaricom Enforcement Liaison Officer found had been used with the phone belonging to the deceased, four days after the deceased died. The line was on use in the deceased phone until 6<sup>th</sup> January 2013 when the line was changed with another whose owner the police were not able to

- get.
32. From the evidence before court, the deceased phone was used with line 0703114665. That line was not registered so the owner of the line remains unknown. It is the same line police found in the Altel phone recovered from Ann.
  33. PW13 who placed the accused in custody on instructions of officer in-charge of crime on 23/2/13 stated clearly that accused had no property on him. PW13 is not the one who recovered the Altel phone.
  34. PW12 the investigating officer of this case, in his evidence he said that the accused was arrested by PC Bulu and PC Khaemba both of Kiambu police station. The accused was then handed over to him by IP Mbithi.
  35. PC Bulu was PW13 and he was very clear that Ag. IP Wambua, officer-in charge of crime branch handed over the accused to him and PC Khaemba at the Report office where both were on duty. They did not arrest the accused and they did not recover anything from him.
  36. The prosecution have not called the arresting officer of the accused to tell us whether the phone Altel was recovered from him. The accused has denied having been arrested with his phone and has said that it was in fact taken from him by Anne.
  37. Further the accused denies the line found in the phone explaining it is Anne who removed his line and inserted hers in the phone. The accused stated that he saw his phone again with a police inspector who also arrested him.
  38. At the end of the day I find that the prosecution has failed to adduce evidence to create a nexus between the accused and the line 0703114665, which as per the Safaricom Data was used in the deceased phone between 29<sup>th</sup> December 2012 and 6<sup>th</sup> January 2013. Prosecution did not produce deceased phone and accused phone.
  39. I find that the prosecution has failed to prove the charge against the accused as the evidence adduced falls far below the required standard. Accordingly, I give the accused the benefit of doubt and acquit him of the charge of murder contrary to **section 203 of Penal Code** under **section 322 of Criminal Procedure Code**.

**DATED AT NAIROBI THIS 10<sup>TH</sup> DAY OF DECEMBER, 2015.**

**LESIIT, J.**

**JUDGE.**