



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 46OF 2011

LESIT, J

SOLOMON KIRIMI M'RUKARIA.....ACCUSED

V E R S U S

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Accused **SOLOMON KIRIMI M'RUKARIA** was charged with one count of murder contrary to section 204 of the Penal Code. The particulars of the offence are on the 26th April 2011 at Kithare Village Kiamwitari Sub Location, Thuura Location, Meru County, within Eastern Province murdered LUCY KAAGA MUGAMBI.
2. The prosecution called seven witnesses. There was no eye witness of this incident. PW3 and 5 who are father and daughter testified that they heard their dogs barking at night and that when they went to check, they found the deceased lying on the ground with deep cuts on the head. They also saw the accused person standing nearby armed with a panga and stick with blood stains and his clothes having blood. The two witnesses claim that they escorted the accused person first to the Sub Area who refereed them to the Assistant Chief. They claim when they went to the Assistant chief, she referred them to the police and as a consequence they let the accused person go away. They said that they released the accused because they were disappointed that the Assistant Chief had taken no action. Eventually after the investigations were done the accused was arrested and charged with this offence.
3. The accused person gave a sworn defence in which he put forward an alibi as his defence. He said that on the morning of 26th April 2011, he woke up very early in the morning as usual because he used to walk to his place of work at Kaaga. He said that after the day's work he went home where he showered and then slept. He denied meeting PW3 and 5 during the night in question and also denied that he was taken to the home of the Assistant Chief. He also said that he never met the deceased on the day of the incident.
4. The accused person is facing a charge of murder. The burden of proof lies squarely with the prosecution to prove the charge against the accused person on the required standard of proof beyond any reasonable doubt. The prosecution must adduce evidence to establish the ingredients of the offence; which are that the accused person is the one who inflicted the injuries on the deceased and that the injuries led to her death, and further that at the time he inflicted the injuries on the deceased he had formed the necessary intention to either cause death or grievous harm on the deceased.
5. Section 206 of the Penal Code gives the circumstances under which malice aforethought can be

either proved or inferred. It provides 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)...

(d)... ”

6. The evidence adduced by the prosecution is circumstantial evidence. The circumstantial evidence is that the accused person had a blood stained panga, stick and clothing at the scene where the body of the deceased person was found. Secondly that the accused went into hiding after the incident.
7. In **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

“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.”

8. As earlier stated the circumstances which the prosecution is relying upon in order to establish *actus reus and mens rea* are twofold. First that the accused person was present at the scene where the body of the deceased was seen by PW3 and 5 and that he had a panga and stick which had blood stains and that his clothes were also blood stained. Second that after this incident, the accused went into hiding. The question is whether the prosecution has adduced cogent and reliable evidence to establish the two facts.

9. I have considered the evidence of PW3 and 5. They were the first people to arrive at the scene where the body of the deceased was lying. The incident took place past mid night and therefore it was dark at the scene. PW3 said that after hearing his dogs barking he went out of his house carrying a torch, and that his daughter PW5 followed him. She had no torch. PW3 was the best placed to see the area in front of him. His evidence was very clear that as he approached the scene where his dogs were he also saw the accused person walking towards the same scene from the direction of his house. PW3 was therefore clear that the accused person arrived at the scene of the incident almost simultaneously with him and his daughter. From the evidence of PW3 there is no cogent proof that the accused had an opportunity to inflict any injuries on the deceased just before PW3 and 5 arrived at the scene.

10. No exhibits were produced in this case. The stick and panga which PW3 and 5 both claim were blood stained were not produced in court. PW5 in her evidence said that they had disarmed the accused of the panga but returned it to him when the Assistant Chief, PW4 refused to take over the accused. Therefore apart from the word of mouth from these two witnesses, there is no evidence that the accused had a blood stained panga and stick at the scene of this incident on the night in question. In any case having blood stained items does not, perse unerringly point towards

the guilt of the accused. There could be an innocent explanation for the blood stains.

11. PW3 and 5 implicated the accused person as having made a confession that he had murdered someone to the Sub Area where they first took the accused, and also to the Assistant Chief. The Sub Area was not a witness but his son PW2 testified in court. The son, PW2 in his evidence said that when PW3 went to their home, he heard him telling his father, the Sub Area that there was a young man called Solomon Kirimi who had beaten Lucy David and that they had apprehended him. PW2 changed his story in his evidence in chief and said that it was one Erick who reported the matter to his father, and that the father told the said Erick that PW3 had already reported the matter to him. From the Evidence of PW2 therefore the alleged confession by the accused to the Sub Area was not confirmed.

12. PW3 and 5 alleged that the accused confessed the murder to the Sub Chief PW4. PW4 who was the Assistant Chief contradicted their evidence. First of all she denied that she went out to the gate of her house to speak with PW3, 5 and others. She said that it was her husband who went out to the gate and spoke to PW3. According to PW4 the conversation she heard between her husband, the suspect and PW3 regarded theft of money from the suspect by the victim. PW4 did not say who the suspect was neither did she name the victim. This is not a surprise because she never went out to the gate and so could not be able to give any details. PW4's evidence contradicted the evidence of PW3 and 5 on two particulars; one that she had gone to the gate of her house to talk to PW3 among others; and two that the accused confessed to her that he had committed a murder. The contradictions in the evidence of PW3 and 5 on one hand and PW4 on the other were material and substantive.

13. PW4 gave very interesting evidence concerning the person suspected to have committed this offence. According to her the person suspected of committing the murder in this case was a lady called Nkuruguchu. PW4 testified that according her own investigations concerning the matter, the deceased person was last seen alive in the company of that woman called Nkuruguchu. She said that the suspect was still being sought for. The evidence of PW4 could explain PW3's own evidence that he saw the accused person approaching the scene where the deceased was lying from the direction of his house at the same time as he was walking towards the scene. That statement suggested that the accused was going to the scene after the murder, just like PW3 and the others.

14. I also considered the statement of the accused in his defence. He put forward an alibi and said that he never went anywhere near the scene where the body was and that he never saw PW3 and 5 that night and that he was not taken to the home of PW4.

15. In the case of UGANDA v. SEBYALA & OTHERS [1969] EA 204, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No. 12D 68 of 1969 where his lordship observed:

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

16. I am guided by the above persuasive authority. The principle of testing alibi defence is analyzing the entire evidence adduced by both sides and satisfying oneself whether the story given by an accused person creates doubt in the veracity of the prosecution case. I have tested the alibi defence by the accused person and find that it has created a reasonable doubt as to the credibility of the prosecution case. The prosecution case was full of material contradictions in the evidence of the key witnesses who were also the key players in the case. The inconsistencies could not be resolved within the case. They went to the very root and substance of the prosecution case. These contradictions were also of material importance to the evidence of the prosecution.

17. I find that as a result of the prosecution case as presented it was not based on cogent evidence and the credibility of the witnesses was also doubtful. The circumstantial evidence does not point unerringly at the accused as the one who committed the murder. When considered cumulatively the circumstantial evidence adduced does not form a complete chain showing that it was the accused who committed this offence.

18. Having doubted the credibility of the witnesses of the prosecution and having found the circumstantial evidence insufficient to prove the accused culpability for this offence, I find that the prosecution has failed to prove the charge against the accused person on the standard required of proof beyond any reasonable doubt. Consequently I give the accused person the benefit of doubt and acquit him for the offence of murder contrary to section 203 of the Penal Code as charged.

DATED, SIGNED AND DELIVERED AT MERU THIS 27th DAY OF FEBRUARY 2014.

LESIIT, J.

JUDGE