



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 6 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

KARANI SIMEON NDIRARA.....ACCUSED

JUDGMENT

The accused **KARANI SIMEON NDIRARA** 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 the 1st day of February, 2012 at Kongowea Location, Kisauni in Mombasa County, murdered KADOGO SANARE NAIROMBE.”

The information was read out to the accused in the High Court at Mombasa on 21st February, 2012 and he entered a plea of ‘*Not Guilty*’ to the charge. Hearing of the trial commenced before me on 28th March, 2012. **MS. MANGO** Advocate appeared for the accused whilst **MR. TANUI** learned state counsel acted for the prosecution. The state called a total of eight (8) witnesses in support of their case. The brief facts of the case were as follows

The accused ‘*Karani Simeon*’ and the deceased ‘*Kadogo Sanare*’ were both watchmen who were employed as night guards at adjacent apartment blocks in Nyali. On the night of 2nd February, 2012 one tenant who lived on the 2nd floor at Nyali Executive Apartments **CHRISTINE NJUGUNA PW2**, told the court that at about 1.40 a.m. she was in her house and was still awake as she had been unable to sleep. She heard a commotion from the basement where the guards usually sat and she heard a man shout out once. **PW2** did not go out to check what was amiss as she was understandably too scared to do so. Instead she phoned her neighbour **BEATRICE MUROMI PW3** and asked if she had heard anything. **PW3** said she had heard no noise. A few minutes later both women state that they heard the sound of running water and sweeping as if the ground was being washed. The next morning they notices blood stains on the floor of the basement where the tenants normally parked their vehicles. The trial of blood led to a nearby quarry. Neither of the two night guards was present. The caretaker **MASUDI OMARI** went to report the matter to the police. On the evening of 3rd February, 2012 the accused reported on duty as usual and he was arrested by police. The deceased did not report on duty. Police continued to search for the deceased. On 3rd February, 2012 two days later police recovered the body of the deceased in a septic tank within the compound. The body had stab wounds on the neck and stomach. Police removed the body to the mortuary and an autopsy was conducted. At the close of investigations the accused was arraigned in court and charged with the murder of the deceased.

At the close of the prosecution case the accused was found to have a case to answer and was placed on his defence. The accused opted to give a sworn statement in which he denied any knowledge of how the deceased met his death. It is now upon this court to determine whether the evidence on record proves the charge of murder beyond a reasonable doubt.

The offence of murder is defined by section 203 of the Penal Code as follows

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

This definition identifies three crucial ingredients, all of which must be proved beyond a reasonable doubt in order to establish the offence of murder. The three ingredients requiring proof are

1. Proof of the fact and cause of death of the deceased.
2. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused; and
3. Proof that said unlawful act or omission was committed with malice aforethought.

In this case the first ingredient is not in any doubt. **PW1** was present when police removed a body from the septic tank. **PW7 SERGEANT MICHAEL ODUOR** gazetted scenes of crime officer told the court that he took several photographs which were produced in court as exhibits. **Pexb2** show the partially decomposing body of a male adult with visible stab wounds. **PW1** and **PW4 SAMSON KIPKOECH** also a tenant in the flats, both of who knew the deceased well identify the body as that of their night watchman named ‘*Kadogo Sanare*’.

Evidence regarding the cause of death was adduced by **DR. IRENE MURAMBA** a pathologist attached to Coast General Hospital. She told the court that she conducted an autopsy examination on the body of the deceased which body was identified to her by his relatives. She noted several cuts on the head and stomach. The jaw bone was fractured. Internal examination revealed a puncture to the intestine. **PW5** told the court that she was unable to ascertain a cause of death due to the level of decomposition to the body. However she confirmed that foul play must have been involved due to the cut wounds on the body which she opined were caused by a sharp object. The doctor filled and signed the postmortem report which was produced in court as an exhibit **Pexb1**. From this testimony it is clear that the deceased met his unfortunate death as a result of being cut all over the body.

The next crucial question is whether it was the accused who so assaulted and cut up the deceased leading to his death. There was no eye witness who saw how the deceased met his death. Evidence is that the accused and the deceased both worked as night guards in a block of apartments. They often sat in the basement where cars were parked. The accused in his defence told the court that the deceased was his uncle and it was the deceased who got him the job. The witnesses appear to confirm this when they state that the two were both Tanzanians and that they appeared to have a good and close relationship. More specifically on the material day nobody saw the two fight or quarrel.

The prosecution seeks to rely upon circumstantial evidence in order to secure a conviction against the accused. However, in order for circumstantial evidence to suffice it must form the **only possible** explanation of how the deceased met his death. In the case of **SAWE VS. REPUBLIC [2003] KLR** the Court of Appeal held that

“Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied upon.”

Thus this court must analyze the evidence with an eye to determining if the chain of circumstances remains unbroken.

PW2 states that at about 1.40 a.m. on the material night she heard a shout. No other person heard this shout. **PW2** is not able to state with certainty that the shout she heard came from the deceased. **PW2**

and **PW3** state that they then heard the sound of running water and sweeping. The implication is that somebody was trying to wash away blood stains. Neither **PW2** nor **PW3** went out to confirm who was washing the basement at that hour. The next morning **PW2** and **PW3** state that they saw blood stains in the basement where the two guards often sat. There is no evidence that this blood came from the deceased as no samples were taken for analysis. It is strange that all this happened at about 1-3 a.m. yet **PW4** who came home from Nairobi at 5.00 a.m. appeared not to have seen anything unusual. He states that

“On the night of 1st February, 2012 I arrived from Nairobi very early in the morning at about 5.00 a.m. I drove in and parked my vehicle and got into my house. I do not recall having seen any of the watchmen at the time I came in.....”

Therefore, despite **PW2** and **PW3** having heard some commotion at 1.00 a.m., **PW5** who drove in at 5.00 a.m. apparently saw nothing unusual. He just parked his car and entered his house. He did not mention seeing blood stains on the ground. There appears to be a disconnect here in the evidence.

In her evidence **PW2** stated that accused clothes had been washed and were on the line. The suggestion is that the clothes may have been washed to get rid of blood-stains. These clothes were not produced in court as an exhibit. There is nothing sinister in a watchman washing his clothes at his place of work. A blood-stained rungu allegedly recovered near the quarry was produced in court by the investigating officer **CHIEF INSPECTOR WAMOCHIA PW6**. No analysis was conducted on the said stick to determine if it had the deceased blood on it. More importantly no link is made between the accused and said stick. No witness is able to state with certainty that the stick belonged to the accused. **PW1** told the court that on the morning of 3rd February, 2012 he met the accused near Kongowea as he came to work. **PW1** did not talk to the accused. They merely waved to each other. However, he noticed nothing unusual or suspicious about the accused.

All the witnesses state that the day after the incident the accused came and reported to work as usual. Indeed the police arrested him from his work place. If indeed the accused had so savagely murdered his colleague it is highly unlikely that he would have just reported back to work. He is more likely to have absconded. By all accounts the accused did not resist arrest and he was with police even as they were searching for the body. By his behaviour the indication is that the accused knew nothing about the death of the deceased. The attack on the deceased was particularly viscous. He had several stab and cut wounds to his body. It is unlikely that the person who attacked him would have escaped unscathed. No wounds, bruises, cuts were noted on the accused at all. No signs of a struggle were noted at the scene. All in all the evidence is not cogent and in my view does not make out a credible circumstantial case against the accused. **PW4** conceded that there have been several burglaries in their flats. There exists the very real possibility that the deceased could have met his death whilst trying to repulse such robbers. The accused who guarded the adjacent block of flats may well have seen or heard nothing. The case against the accused is based on suspicion. It has been stated severally that suspicion no matter how strong cannot form the basis for a conviction. The prosecution has failed to adduce credible and/or tangible evidence linking the accused to the death of the deceased. As a court I do harbour grave doubts about his guilt. The benefit of such doubt must be determined in favour of the accused. I find that the ‘*actus reus*’ for the offence of murder has not been proved against the accused. I therefore enter a verdict of ‘*Not Guilty*’ and I acquit the accused of the charge. Accused is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered in Mombasa this 16th day of April, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Mlandi h/b Ms. Mango for Accused

Ms. Mwaura for State

Court Clerk Mutisya