



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 67 OF 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**DENIS KAMAU Alias NJUGUNA.....ACCUSED**

**JUDGMENT**

The accused, Denis Kamau alias Njuguna, is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge are that on the night of 25<sup>th</sup> and 26<sup>th</sup> September 2009, at Narok North District, he murdered John Ndungu. He denied committing the offence and it proceeded to hearing by the prosecution calling a total of 6 witnesses in support of their case. The accused made a sworn statement in his defence and called no other witness.

PW2, Daniel Batai, a friend to the deceased's family recalled that in 2009, he was working at Royal Hotel which was next to Classic Hotel which was owned by the deceased. He knew the accused as Njuguna who had worked for the deceased as a cook and waiter at the said Classic Hotel. He recalled that on 26/9/2009, about 5.00 a.m., he was woken up by his workmate, Joshua, who asked him to go and see the deceased who was lying on the floor in Classic Hotel. PW2 said there were rooms behind Classic and Royal Hotels where he lived. He found the deceased on the floor with a hat stashed in his mouth. He did not see any other injuries on the deceased. He said at that Classic Hotel used to open between 10.00 p.m. to 4.00 a.m; that Royal Hotel where he worked used to close at 10.00 p.m. and he would go to help cook chapatis at Classic. He was at the said Classic Hotel on the night of 25<sup>th</sup> till 10.30 p.m. where he left the accused and deceased. He said that whenever they worked till late accused would sleep in one of the rooms behind the hotel. He did not find Njuguna at the hotel on the morning of 26/9/09. PW2, went to report the deceased's to his family. PW2 said accused disappeared till he was arrested about 2 years later. In cross examination PW2 admitted that he never mentioned the name of Njuguna to police but referred to a certain boy. He denied knowing whether there were lodgers in the rooms behind the hotels on the said night.

PW3, Joshua Ntaiya, knew both the deceased as owner of Classic Hotel and the accused who worked for the deceased. He was working in Royal Hotel then. He was going to open the main gate on 26/9/09 when he noticed the deceased's door open, he opened and found the deceased on the floor, dead. He went to call PW2 and they then reported to Narok Police Station. He said that he had seen the accused and the deceased working at the hotel the previous night at about 10.00 p.m. and he did not know where the accused went thereafter.

PW4, Peter Kimani Ndungu, is the son of the deceased. He also identified the accused as Njuguna, who used to work at his father's hotel and that he would work from 9.00 p.m. to 7.00 a.m. and that the hotel used to open from 9.00 p.m. to 3.00 a.m. and after closing, the accused would be left cleaning up and

sleep there. He also confirmed that PW2 used to assist in cooking mandazi and chapati. PW4 told the court that he had a barber shop in the same plot as the hotel which he closed at 9.00 p.m. He watched a film in his house in the same plot and he left the deceased with the accused at midnight when he went to sleep. PW1 informed him of the father's death early next day. PW4 said that the rear door was broken and that it was normally locked using a padlock that things were scattered in the house and that someone may have accessed the shop from the hotel as the door between the hotel and shop was not locked. He also said that the accused disappeared that day till he was arrested 2 years later.

PW5, Steven Ngatia Ndungu, is also a son of the deceased. He recalled that on 25/9/09 at about 9.00 p.m, he left his father with Njuguna and went home. He learnt of the father's death next morning and went to the hotel and the door to his father's bedroom was broken, with a green cap stuffed in his mouth. He noticed cash book missing and the deceased's pockets were turned out, cash box was missing.

PC Samuel Ngige (PW6) was based at Narok Police Station on 26/9/09. He was tasked to visit the scene of crime where there was a murder. Scenes of Crime also photographed the scene. He noticed visible injuries on the neck of the deceased as if he was strangled; green cap stashed in his mouth, post mortem was done on 28/9/09 and he recorded witness statements. He was informed the deceased was last seen with Denis Kamau who had disappeared till 26/8/2011, when he was spotted by one of the deceased's sons and was arrested. PW6 confirmed that the door to the deceased's shop was broken and cash box stolen.

When called upon to defend himself, the accused admitted that he used to work for the deceased as a waiter. He served for 18 months. There was a total of 5 employees. He went to work on 26/9/09 at 5.00 a.m., found Ngatia, PW5, with PW4, workers of the next hotel and they informed him that the deceased had died and there was no work. They promised to pay them after burial. He started doing motor cycle taxi (boda boda) till he was arrested on 28/9/2011. He said that Ngatia had been working with him at the same stage. He denied having any dispute with the deceased and that he had been working with Ngatia all this time and did not know why he was not arrested for the 2 years.

PW1, Dr. Gerishon Abakalwa conducted a post mortem on the deceased's body on 27/9/09 and found injuries on the neck, fracture of the laryngeal structures, face was swollen and he formed the opinion that the probable cause of death was strangulation.

Having heard all the prosecution witnesses, the defence and submissions of counsel, no doubt this case turns on circumstantial evidence because nobody witnessed the deceased's murder. He was found murdered on the morning of 26/9/2009. As per evidence of PW1, probable cause of death was strangulation. The question to be ultimately answered is who committed the murder and if it is the accused, does the evidence irresistibly point at accused as the murderer?

There is no doubt that the accused was an employee of the deceased. He did admit that even as of 25/9/09, he was still employed at Classic Hotel as a waiter. PW2 said that the accused was left with the deceased at about 10.30 p.m. PW3 also said he left them together about 10.00 p.m. PW4 said he left the accused with the deceased about midnight while PW5 said he saw them together at 9.00 p.m. I believe and find that all these witnesses were not lying. The accused must have remained working with the deceased on the said night of 25/9/09. Interestingly, when PW2 and PW3 reported at Police Station next day, they never said that they left accused with deceased. PW4 who wrote his statement with police next day did not record that he had left accused with deceased.

It is PW2 and PW3 who seem to have visited the scene where the deceased was found before PW5 arrived. PW2 on cross examination, denied that any door had been broken. PW3 said that there was no disturbance at the scene where deceased was found but he saw a broken door. The evidence of these two was quite different from that of PW4 as to how they found the scene. Both PW4 and PW5 said that the rear door was broken, a padlock had been removed, drawers broken, cash box was stolen and one even said that the deceased's pockets were turned inside out. I have no idea why PW2 and PW3 could not disclose that the scene of murder was disturbed, with a broken door and cash box missing. The state in which the scene was found suggests that there was a theft or robbery committed at the said hotel.

All the four witnesses have testified to accused disappearing from his work place from the night they saw him with the deceased. However, in cross examination, all of them never recorded statements to the effect that the accused fled after 25/9/09. But then the witnesses would not have recorded about the accused's disappearance because statements were recorded a day after the murder. Though accused claims to have come to work next day, I do not believe that all these witnesses cheated. There is totally no reason why they would do so. If indeed the accused came back to work the next morning and was told to go away, one is left wondering, why he did not attend the deceased's funeral. It is not normal in my view, for a person who has worked for his employer for about 18 months to go missing on the night that the employer is found murdered and he disappears till he is found two years later. Accused's conduct raised a lot of suspicion as to whether or not he was involved in the deceased's murder. The accused's conduct, in my view, goes to show his guilty demeanor. The breaking of doors and cash box is evidence that the deceased may have been robbed. However, suspicion alone cannot found a conviction. As pointed out earlier, the only evidence against the accused is circumstantial evidence that he disappeared for two years after the deceased was found dead but there is no other evidence directly linking him with the murder of the deceased. For circumstantial evidence to found a conviction, the threshold is as espoused in the case of **Kipkering & Another v Rep** (1949)16 EACA 15, the court said:-

**“the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”**

The evidence should irresistibly point at the accused as the murderer. In this case there was evidence that the deceased's premises had lodgings at the rear. It was not clear whether there were lodgers in the rooms that night. There was also a mention of one David Ouma who used to work for the deceased and who had refused to come to work. Those are possible suspects too. In this case, neither the *actus reus* nor malice aforethought have been proved as against the accused. For that reason, I find that the prosecution has failed to prove its case beyond any doubt as required of it and the accused will be given the benefit of doubt and his hereby acquitted of the charge of murder under **Section 322** of the **Criminal Procedure Code**. He is set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 25<sup>th</sup> day of July, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Chirchir for the State

Mr. Njuguna holding brief for Mr. Mongeri for the accused

Accused present

Kennedy – Court Assistant