



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 5 of 2011

REPUBLIC.....PROSECUTOR

-VERSUS -

PETER KAMAU MUTHONI..... ACCUSED

JUDGMENT

The accused person is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on the 27th day of December 2010 at Nyacaba village in Juja Division of Thika District, he murdered Simon Githinji Wangare. The accused pleaded not guilty to the charge.

On the 7th June 2012, I took over this case from Kimaru J who was transferred to another station. **Section 200** of the **Criminal Procedure Code** was complied with. Directions were given that the case proceeds from where the judge had reached. I heard the case to completion.

The prosecution's evidence was that the deceased and the accused lived at Nyacaba village at the material time. In the evening of 27/12/10 around 8.00 p.m. the accused and the deceased were seen walking together from Nyacaba trading centre towards their plot. On the road to their residential plot, a quarrel broke out between the two men. A short while later, the deceased was found on the footpath leading to their places of residence lying unconscious with a stab wound on the left side of the chest. The accused was said to have fled from his home the same evening until 29/01/11 when he was arrested at Iyego area in Kangema while attending his uncle's burial arrangements. On completion of investigations the accused was later charged with the offence.

PW1 testified that in the material evening, he was walking home from Nyacaba market at around 8.00 p.m when he found the accused and the deceased on the road quarrelling. The deceased was demanding that the accused returns his stove and plate he had borrowed from the deceased. The deceased was a friend and neighbour of the accused. PW1 was a friend to both the accused and the deceased. The witness left the two men on the road and proceeded to his home. Similarly, PW2 was on the road walking home around the same time when she came across the accused and the deceased. She could hear them talking but did not hear what they were saying. PW2 was a neighbour of the accused and the deceased. PW2 was later to identify the stove and the plate of the deceased on the material evening after they were returned to deceased's house. The witness walked ahead towards her home and met a friend on the way. As she was chatting with the friend, she was informed by passersby that the deceased had been stabbed and was lying on the footpath. PW2 walked back to the scene and found PW2 unconscious. The deceased died shortly afterwards. The postmortem findings were that the cause of death was a penetrating chest wound and heart injury.

The accused in his sworn defence denied committing the offence. He said the deceased and himself were good friends and stayed in one plot but in different rooms. On the material evening, he was telephoned by the deceased who requested that the two meet at the shopping centre that evening. At the time the two talked on phone, the deceased had gone to visit his parents in the neighbourhood while the accused was at the shopping centre. The two men met and walked together towards home. The accused said they parted at around 9.00 p.m with the deceased going to the home of his parents and the accused going to his residential room in the plot. The accused says he was sick at the material time and could not cook for himself. His sister who had secured for him a place to stay at Nyacaba used to give him food. He took his drugs that evening and slept and did not hear anything that night. The following day, the accused went to his grandfather's home for his uncle's burial arrangements. He denies having borrowed a stove and plate from the deceased. He said he was arrested from his grandfather's home two days later and charged with the offence which he denies having committed.

DW2 was the sister to the accused. She testified that the accused was at Nyacaba until 28/12/10 when he went to their grandfather's home for the burial. The accused was under the care of their elder sister who had rented for him a room at Nyacaba. The accused was arrested during the funeral arrangements at Iyego in Kangema.

It is the evidence of PW1 and PW2 that the accused was the last person who was seen with the deceased before he was killed. PW2 knew both the accused and the deceased. He said they were his acquaintances and that the two lived in one plot consisting of eight housing units. Each of them occupied one unit in the plot. PW1 lived about 200 metres from the plot occupied by the accused and the deceased. He testified that the two men were quarrelling on the footpath near their residential plot. The deceased was found stabbed a short while later at the scene. PW2 passed the two men and walked ahead. Her home was about 200 metres from the scene. PW2 met a friend and as she was chatting with him, she was informed the deceased had been stabbed. It was her evidence that she got the information about the stabbing barely ten (10) minutes after she passed the accused and the deceased. The deceased was found on the footpath leading to his house. This is the same place where the deceased was found by PW2 when she walked back. He was still alive but unconscious. He died a short while later. The death of the deceased took place less than ten (10) minutes after PW2 passed him as he stood with the accused. PW1 who was a friend to the two men testified that the two were quarrelling when he passed them. The subject of the quarrel was a stove and plates which the accused had borrowed from the deceased and failed to return. The deceased was demanding that his property be returned.

When PW2 went with police to the house of the deceased, they found that the items deceased was demanding had been returned. PW2 identified the property because she used to use them in the house of the deceased. PW3 was the father of the deceased who testified that the deceased was his son while PW2 was his daughter. The deceased lived in a rented room about 200 metres from his parents home. PW2 said she lived with her mother and sisters at Nyacaba market. It is therefore highly probable that PW2 used to visit her brother and cook in his rented room using his utensils. Indeed she confirmed this fact when she said that she was able to identify the stove and plates which she had used before hand.

The incident took place at night and it is important that identification be established. PW2 said he heard the voices of the two men. He was familiar with their voices. PW2 said there were electric security lights from the plot which illuminated the scene. This was identification by recognition because the witness knew the accused and the deceased. The evidence of PW1 was corroborated by that of PW2 on recognition. I found the evidence of the two witnesses credible, consistent and detailed on what transpired. The conditions for identification were in my considered opinion positive.

The police officers who went to the scene (PW7 and one P.C. Kipruto) were on patrol at the market. They heard people screaming at the scene and rushed there at around 9.00 p.m. They found the deceased lying in a pool of blood at the scene in the presence of a crowd. He was dead by then and had a stab-wound on the left side of the chest. The police officers found PW2 at the scene and she explained to them what she knew about the incident. PW7 was led to the house of the accused by PW2. The accused was not in his house at that time. PW7 told the court that he continued looking for the accused in his house for the next three days and could not find him. He was later to pick him at Kangema police station after he was

arrested by PW6 who acted on information from one Gladys Waithera.

The evidence of PW2 and PW7 established the fact that the accused fled the scene after the incident. In his defence, the accused said he travelled to attend his uncle's funeral at kangema. His own witness DW2 said the accused went to their grandfather's Kangema home on 28th December 2010. The accused told the court that he was asleep in his house at the time PW2 and PW7 went looking for him in the material evening. I did not find his defence plausible when he said that he had taken his drugs and slept and that he heard nothing that night. PW7 was a police officer who was on patrol duty within the vicinity and was attracted by screams. He rushed to the scene and then to the house of the accused with PW2. This was slightly past 9.00 p.m. according to the description of events. If it was true that the accused was sleeping in the house after the incident, PW7 would have found him there. The court finds no issues as to the accused travelling to kangema on 28th December 2010 because there is evidence that he had lost a relative. The issue is where he was in the material night after the incident and the following morning before he left for Kangema. PW7 said that he looked for the accused in his residence in vain. He failed to give a reasonable explanation as to his whereabouts. His witness DW2 was not at Nyacaba at the material time. She said she lived in Nairobi. As such, she would not have known what transpired in the evening of 27th December 2010 at Nyacaba.

The alibi of the accused as to the time of the incident was dislodged by the strong evidence of PW1 and PW2 who saw and heard him quarrel with the deceased at the scene. PW7 said that the deceased lay in a pool of blood at the scene. This is evidence that the deceased was stabbed at the scene, fell down there and became unconscious due to the bleeding. The deceased met his death at the same spot. The doctor confirmed that the cause of death was the stab wound on the chest.

There was no eyewitness to the incident and the only evidence before the court is purely circumstantial. I have evaluated the evidence which clearly shows that the accused was the last person who was seen with the deceased about ten (10) minutes before he (deceased) met his death. There is evidence that the accused who was a neighbour and friend of the deceased fled immediately after the incident. It was also established that there was a quarrel between the accused and the deceased concerning a stove and a plate. These items were confirmed returned to the house of the deceased a short while after his death. PW2 and PW7 identified the items in court. There is no evidence that the deceased met any other person other than the accused from the time PW1 and PW2 witnessed the two men quarrel on the footpath leading to their residential plot. The period between the time of the quarrel and the time the deceased was discovered having been stabbed was only about ten (10) minutes or less.

The defence argued that there was no forensic evidence in respect of the stove and the plate and that the murder weapon was not recovered. The counsel submitted that the scenario made it difficult to connect the accused with the incident. It is my observation that the police were negligent not to develop forensic evidence regarding the items in question. However, each case depends on its own facts and a conviction shall not only be sustained where the murder weapon has been recovered or where there is forensic evidence. In the case before me, I find that the circumstantial evidence is sufficient for the consideration of this court as to the guilty of the accused.

In the case of **Neema Mwandoro Ndurya vs. Republic (2008) eKLR** Court of Appeal Omolo J, Okubasu J and Onyango Otieno J, said that:

“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics.”

I am therefore aware that for the court to rely on circumstantial evidence, it should be examined very closely and thoroughly. The Court of Appeal Bosire J, Onyango Otieno J and Nyamu J in the case of **Charles Maina Wambugu vs. Republic Criminal Appeal No.346 of 2007** held that:

“1) An offence of murder can be established by evidence tendered directly pointing it or by evidence of facts from which a reasonable person can draw the inference that murder has been

committed.

2) In a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and capable of explanation any other hypothesis than that of guilt.

It is also necessary before drawing the inference of the accused guilty from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

In the case before me, the accused admitted in his defence that he was with the deceased on the material evening and that the two walked together parting at around 9.00 p.m. The deceased went to his parents home while the accused went to his rented room. This was in contradiction with the accused's purported alibi that he was not at the scene. To the contrary, the accused was at the scene and had the opportunity to commit the offence. There is evidence that the deceased was stabbed between 8.00 and 8.30 p.m. There is corroborated evidence that the accused was the only person in the company of the deceased during that time. The accused failed to discharge the burden of proving the contrary as required by the law. **Section 111** of the **Evidence Act** provides:

“When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception 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 with the knowledge of such person is upon him.”

The accused in this case did not explain a fact peculiarly within his own knowledge which would have put him within any exception or exemption from the existing circumstances established by the prosecution witnesses in regard to the events of the material time. I find that **“there were no other existing circumstances that weakened or could weaken that evidence or destroyed it”** as was said in the case of **Charles Maina Wambugu vs. Republic** which had similar facts. For these reasons, the irresistible inference is that the accused stabbed the deceased on the material date and time which act caused his death.

The court must now determine whether there was *mens rea* on part of the accused when he stabbed the deceased. The two key prosecution witnesses testified that the deceased was demanding that the items that the accused had borrowed from him be returned. The accused and the deceased were friends and good neighbours. They used to borrow items for use or consumption from each other. The accused said in his defence that they could borrow cigarettes from one another. On that evening, the accused said he shared a cigarette with the deceased.

It appears the quarrel broke out when the deceased demanded that his property be returned. It is not known which of the two was armed with the sharp object which was used to stab the deceased. There is possibility that it could be either of them. The doctor found that it was a penetrating wound. There is no evidence that the accused planned the murder before he executed it. The prosecution failed to prove premeditation on the part of the accused. There is evidence of the quarrel, the demand to return property at the scene and the death of the stabbing of the deceased following immediately thereafter. Without any proof of premeditation, the only inference that can be drawn from the existing circumstances is that the accused could have been provoked by the demand of the deceased.

I therefore find that *mens rea* has not been established. It follows that the prosecution have proved a lesser charge of manslaughter against the accused.

I find him guilty of the offence of manslaughter contrary to **Section 202** as read with **Section 205** of the **Penal Code** and convict him accordingly.

F. N. MUCHEMI

JUDGE

Judgment dated and delivered in open court in the presence of the accused, the defence counsel Mr. Odawa and the State counsel Ms. Gichuhi on the **25th** day of **February 2013**.

F. N. MUCHEMI
JUDGE