



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL CASE NO. 108 OF 2010**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PAUL NJOROGI KAMAU.....ACCUSED**

**JUDGMENT**

By an information dated 19/10/2010, the accused, Paul Njoroge Kamau, was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on 16/10/2010, at Olkinyei area in Narok North District, he murdered John Ole Sasire. The accused denied the offence and the case proceeded to full trial wherein the prosecution called a total of 7 witnesses. After the close of the prosecution case, the court found that the accused had a case to answer and was called upon to enter his defence. He gave evidence on oath but did not call any witness.

Dickson Sangok (PW3) works as a herdsboy for Salash Dapash at Olkinyei. He testified that on 16/10/2010, about 2.00 p.m. he was passing by the house of Sasire (the deceased) when he found three people. Two were at the door of the house while one person was inside. The two standing outside the house were Kamau and Paul (Mandevu) while Paul was hitting the person who was lying down on the floor of the house with a stick. PW3 just peeped at the door and passed. The house had no door. He later learned that Sasire had died and he was asked to go and record a statement with the police.

PW4, Salash Dapash, told the court that he is a farmer in Olkenyei, Narok and knew the deceased as his farm hand. PW4 also knew accused as a person who did casual jobs in neighbouring farms in Olkenyei. PW4 told the court that he had been away from home for two days when on 17/10/2010, he received a call from George Ole Kipury (PW5) that the deceased had been murdered. He went back home and reported to the area Chief. He went to the deceased's house and noted that he seemed to have been strangled with a rope, had injuries on the body like those inflicted by a stick, and had burns on the head and stomach. The house was disturbed with things strewn all over, as if there was a fight or struggle. George Ole Kipury (PW5) informed him that the deceased and one Mandevu had argued over Kshs.1000/- and that there were three others, Paul Njoroge, Wilson Mbutia, Samuel Njoroge and Edward who had been arrested over the murder. PW4 saw police take photographs of the body and the scene before removing the body when asked by defence counsel. He denied seeing the tongue of the deceased protruding from the mouth or the eyes dilated.

PW5, George Ole Kipury, a resident of Olkinyei, did not witness the murder. PW5 testified that earlier on, he had given the deceased, Mandevu and Njoroge money for them to do for him some casual jobs but Paul did not work because he was sick. The day before the murder, he asked them to pay him back the money. Paul and Mandevu went to get the money from the deceased in order to pay back. The three of them went to ask the deceased for the money. The deceased took them to a certain lady's house where he claimed to have left the money but the lady denied having his money. Mandevu got annoyed with the

deceased, made him fall. Paul (accused) paid PW5 Kshs.650/-. The deceased left them at the lady's house where alcohol was being sold as Mandevu kept threatening that somebody would die. They parted about midday as PW5 went to Salash's home. Mandevu followed PW5 there. Alcohol was being sold there too. Mandevu continued talking about somebody dying and he was asked to leave. PW5 went home at 2.00 p.m. and slept till 5.00 p.m. He met Paul and Mandevu next morning. He told the court that he was working in a bush near his house when he was called by one Patita and informed that somebody had been found dead in his house. He went with Patita and found the body of Sasire on the floor of his house with a rope around the neck, it had injuries to the body and burns on the chest and shoulder and the head. He called the owner of the house (PW4).

PW6, Cpl. Paul Kiilu of Narok CID Scenes of Crime was called to the scene on 17/10/2010 and took photographs of the deceased which he produced in evidence as PEx.4(a-d).

PW1, Dr. Alan Soita, of Narok District Hospital performed a post mortem on the deceased on 26/10/2010. He found a cord around the deceased's neck, the whole body was swollen except the head, a fracture of the cervical bone (C3) neck, strangulation of the jugular and carotid vessels. He formed the opinion that the cause of death was asphyxia due to strangulation or lack of oxygen to the lungs. The post mortem report and the rope were produced in evidence as PEx.1 & 2. when questioned by Mr. Orege, counsel for the accused, PW1 denied finding the deceased's eyes dilated and tongue hanging out of the deceased's mouth common occurrence in cases of strangulation.

PW2, Dr. Joseph Njau examined the accused person on 19/10/2010 and found him to be mentally sound and fit to stand trial.

After the close of the prosecution case, the court ruled that the prosecution had made out a case against the accused for him to be called upon to enter his defence. He gave his defence on oath. He told the court that he used to lease farms and carry out farming activities in Narok.

He had known the deceased for a short while. He had never disagreed with deceased nor were they friends. He said that Nganga Mwangi, Edward Mungai, Sangok PW3, Mandevu and others had been arrested on suspicion of deceased's murder even before he was arrested. He denied knowing the deceased nor did the deceased owe him money as alleged. He said that George (PW5) had given him and Mandevu money to make frames for him but he fell sick. He was arrested and when he could not give police Kshs.20,000/- that they demanded, he was charged while others were released.

I have now considered all the evidence on record and the submissions made by Mr. Orege, counsel for the accused person at the close of defence case. Only one witness, PW3, Sangok, testified to having witnessed the deceased being assaulted. PW3's evidence was, however clear, that he found Kamau, Mandevu and one Nganga standing at the door of the deceased's house as the accused assaulted the deceased who was lying on the floor of his house. It came out from the testimony of the witnesses that several people were arrested along with accused. PW3 was arrested but was released. PW4 told the court that he was informed that Wilson Mbutia, Samuel Nganga and Edward Waweru were all arrested. One of them is 'Mandevu' who too was arrested. PW7 also confirmed that four people were arrested for the murder. PW7 said he released Edward Njambi Mungai, Wilson Mbutia and Samuel Nganga and preferred the charge of murder against the accused after he heard evidence from several people. Those people were, however, not called as witnesses. Whereas the law is clear under **Section 143** of the **Evidence Act**, that even one witness, can prove existence of a fact but if the court can find a conviction on the evidence of a single witness, that evidence should be sufficient. The question that begs is why did the prosecution not call the mentioned persons as witnesses. They were said to be at the scene when the accused was allegedly assaulting the deceased. It was not enough for the Investigation Officer (PW7) to casually tell the court that after their release the suspects could not be traced. The court was not even told whether the prosecution intended to call them as witnesses or not and whether they recorded statements. In the case of **Bukenya & Others v Uganda (1972)EA 550**, the court said as follows:-

**“It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty**

**on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case (Trial on Indictments Decree. S.37). Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them, but without success. In the present case, we think the Chief Justice should have considered calling the two persons.”**

It is true that the prosecution had a discretion on who to call as witnesses but it was also upon the prosecution to call sufficient evidence to prove its case to the required standard, that is beyond any reasonable doubt. The question will be whether the evidence of PW3 and PW5 is sufficient to found a conviction.

Upon examination of the deceased, the Doctor Soita (PW1) formed the opinion that the deceased died of strangulation, inflicted by the 20 cm string found on his neck and that his jugular and carotid veins were fractured. PW1 did not record as having seen any other injuries on the deceased. Contrary to PW1's evidence PW7 was only told that the accused was seen beating he deceased with a stick. PW4 who arrived at the scene, noted that the deceased had a rope around the neck, burns to the chest and shoulder, he had an injury to the head and injuries to the body. The scene of crime officer, PW6, saw injuries to the head, neck and buttocks. The photographs taken by PW6 clearly show all the said injuries including the deceased's head which was covered with blood. It is surprising that PW1 did not notice any of the other injuries on the body but concentrated on one, the rope and the neck. So that it leaves the question whether the body that PW1 examined is the same body seen in the photographs PEx.4(a,b,c &d) which I take judicial notice of.

The above notwithstanding, the evidence of PW3 was not shaken. He saw accused assault the deceased in broad daylight He was just passing by when he witnessed the accused assaulting the deceased. He did not stand there to see what happened to the deceased finally. The deceased was found dead the next day. Infact PW3's evidence is corroborated by that of PW5 who recalled that the day before the deceased was found murdered, the accused and one Mandevu had gone to claim Kshs.1000/- from the deceased. It is PW5 who gave to all of them the money for them to do some work for him but they had done and PW5 wanted a refund. That is said to be the source of the dispute between the accused and Mandevu on one hand and the deceased on the other. I am satisfied that the accused had a reason and was seen assaulting the deceased.

It is trite that the burden always rests with the prosecution to prove a criminal case beyond any reasonable doubt, and the accused had no duty or burden to establish his own innocence. However, there are instances when the law places a duty on the accused, to explain certain facts particularly those peculiarly within his own knowledge. **Section 111(1) of the Evidence Act Cap 80 Laws of Kenya** casts the burden on the accused provides as follows:-

**“S.111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption 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 within the knowledge of such person is upon him:**

**Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**

**Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution**

**or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”**

The accused's defence is a mere denial but there is totally no reason why PW3 would have named him as the offender. They had no dispute before. The accused's defence did not in any way dislodge the evidence of PW3 and PW5. He may have been with others not in court but there is sufficient evidence which raises a presumption of fact under **Section 119** of the **Evidence Act** that it is the accused who murdered the deceased.

Despite the failure to call the people mentioned as witnesses, I am satisfied beyond any doubt that the accused either alone or with others murdered the deceased. Malice aforethought can be deduced from the condition in which the deceased's body was found as seen in the photographs PEX.4a, b, c & d. The tying of a rope around the deceased's neck, that resulted in the fracture of C3 and strangulation of jugular and Carotid, was intended to cause the death of the deceased or cause grievous harm to him. I am satisfied beyond any doubt that the accused alone or with others, murdered the deceased. He is found guilty of the offence of murder as charged and I convict him accordingly.

**DATED and DELIVERED this 19<sup>th</sup> day of July, 2013.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Ms Mukenga holding brief for Mr. Orege for the accused

Ms Idagwa for the State

Jared Okumu – Court Clerk