



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO.75 OF 2007

REPUBLIC PROSECUTOR

VERSUS

TIMOTHY NGECHU KIRENGERU ACCUSED

JUDGMENT

TIMOTHY NGECHU KIRENGERU (the accused) 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 night of 25th and 26th July 2007 at MALONGO village in ELEMENTAITA, in Naivasha District he murdered **KIMANI NGANGA**. The accused who is represented by Mr. Kanyi denied the charge. The matter was partly heard by KOOME J and Maraga J (as they then were) who were transferred from Nakuru before conclusion of the trial. It was eventually taken over by Ouko J, who was elevated to the Court of Appeal.

I took over the tail end, to hear the defence case, and write judgment.

The accused's mother **HANNAH NYOKABI (PW5)** had gone to his house on the evening of 26/7/2007, and found his wife (LUCY WAITHIRA) who asked her "**where will you sleep.**" The said wife informed her that the accused had killed KIMANI WAMUGU and dumped his body inside a toilet. PW5 went to the toilet and saw what looked like blood or water. The wife disclosed that the killing had taken place at the blue gum trees.

The accused's brother **PETER NDIRANGU (PW4)** and **JOHN MUKON KARENGETHI (PW2)** received information about the incident from their mother. They went to the toilet and saw some blood. On flashing a torch inside the toilet, he saw a gunny bag. He rushed to go and brief the village elder, and on the way he met the accused; who escaped as they made attempts to apprehend him. Information was relayed to police, and when the toilet was demolished, chopped of decomposing body parts, were recovered. According to PW4, the accused lived about 1km from the scene of recovery.

The village elder **SIMON KAMAU MWOLOLO (PW1)** confirmed that a report was made to him by Peter Ndirangu, John Mukono and James Maina regarding the incident. He was present when the body parts were recovered from the toilet.

The toilet (a pit latrine) was on the property of **SAMUEL KAMAU NGANGA (PW5)**, who was a neighbour to the accused. He had been the accused's teacher in the past. He was picked by police and taken to the scene, where he noticed that there was blood on the toilet's floor. He witnessed the recovery of the body parts.

AP SGT. KANAI THAIRU (PW6) received the report from the village elder, concerning the incident. He proceeded to the scene accompanied by a colleague, and on the way they met accused being escorted by members of the public to the AP Camp. He re-arrested the accused, who then led the police officers to the home of PW5. PW5 is a retired teacher who lives away from the farm where the body was recovered. The accused led the police officers to the pit latrine where a human head, hands and legs were recovered. More body parts including ribs and intestines were found in a sack in the toilet.

The accused then led police to his home and showed them a place within his maize plantation where a home-made gun was retrieved wrapped in a paper and a rain coat. The gun has four live bullets.

It was PW6's evidence that it was apparent that the killing had taken place in the maize plantation, just about 10 metres from the accused's house, as there was lots of blood within the plantation. The police also recovered a blood stained panga inside the accused's house.

The panga was not produced as exhibit nor was it taken to the Government Chemist for analysis.

A post mortem was carried out on the recovered body parts by Dr. Kamau, whose report was produced by **DR. TITUS NGULUNGU (PW7)**. No one identified the body which was in pieces which were reconstructed. It was a 17 year old male, and the body was mutilated, with linear cuts on the chest, and abdomen.

Internally the intestines were mutilated into pieces. There were cuts on the head, including the skull, with decomposing brain.

The cause of death was multiple bodily injuries involving the chest and abdominal organs. Haemorrhage could also have caused the death. A mental assessment carried out by Dr. Kamau on the accused found him to be fit to stand trial.

The recovered firearm was submitted to the ballistics expert and a report produced by Superintendent LAWRENCE NTHIWA confirmed it was in a good state and could fire successfully and was a firearm as defined in Cap 114 (The Firearms Act).

SNR SGT MUKOLWE (PW9) formerly of Elementaita police station received the accused from AP THAIRU. He was in the team which was led by the accused to the pit latrine where the body parts were recovered. He also went with accused to the open field on the accused's land where there was blood on the ground and he noted signs of a struggle from the disturbed grass and blood.

He recovered a blood stained panga from the accused's house, which he treated as the murder weapon. SGT MUKOLWE's investigations established that the accused and the deceased operated as a gang of robbers. They disagreed over the recovered firearm.

In his defence, the accused stated that he had disagreed with his wife on the night of 25/26th July as she was unhappy with the financial support he was giving. The matter was reported to his mother the same night and after discussions, they reconciled. In the morning he left to go and graze the livestock, then shortly he saw his brothers PW2 and PW4, who greeted him and went away. He returned from the fields at 6.00 p.m. and at 7.00 p.m., his brothers apprehended him and took him to the chief's camp and eventually he was handed over to police who said he had killed somebody and dumped the body in a pit latrine at the home of Mzee Nganga. It is his contention that it is his two brothers and the elder (Mwololo) who pointed out the toilets to the police, as he was left inside the police motor vehicle.

He maintains that the deceased was his neighbour and not his enemy so he had no reason to kill him.

The defence counsel submit that the evidence relied on was full of hearsay and suspicion. The information given to the accused's mother about the killing is described as inadequate, since the wife never disclosed whether she actually witnessed the killing. Although the evidence is largely circumstantial, Mr. Kanyi argues that it does not meet the threshold set in **SAWE V R 2003 KLR** pg 64

and that prosecution case has gaps and theories which were never filled up.

It is not disputed that human body parts were recovered from two pit latrines belonging to the accused's neighbour, one Nganga (PW5). None of the witnesses who testified witnessed the killing, and the source of information about the incident was the accused's wife who never testified.

The issues that are for determination are:-

- a. Who was the person whose mutilated body was recovered in the two pit latrines?
- b. What was the reason for the killing?

From the record, no one identified the parts to the Doctor before post mortem was carried out. This might be due to the decomposed state of the recovered parts. The option left for police was to have a DNA profiling carried out to confirm who the person was. Unfortunately this was not done.

Naturally the next question to ask is, if those parts do not form KIMANI NGANGA, then where is he? No member of his family, neighbour or even area chief testified to confirm that Kimani no longer walks on the face of this planet.

The investigating officer offered a motive for the killing – that the deceased and accused were members of a gang of robbers and disagreed when the deceased went to the accused's house with the recovered gun. That would have been a very sound theory for motive, unfortunately the rest of the investigation was very poorly done. Although blood was found at the toilet, and at the scene of murder, no samples were submitted to the Government Analyst for examination. The blood stained panga, likewise was not submitted to the Government Chemist for analysis. In absence of those vital steps, this court is being asked to presume that the blood at the maize plantation and the blood in the toilet belonged to the deceased. Further that this was the same blood found on the panga recovered from the accused's house. Without scientific evidence as to the nature of blood found, it would be a long shot to presume that since the body was found dumped in the toilet, it must be related to the blood noted. There is nothing to confirm that the same was human blood, let alone belonging to the deceased.

This is a case based purely on circumstantial evidence, certainly there are significant portions which would cause one to believe that accused was the culprit. This stems light from his conduct when he saw his brothers and fled away, to leading police to the recovery of the body.

The case of Sawe (supra) held that:-

“1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

The circumstances here that link the accused to the death of the recovered body are:-

1. The blood stained panga.
2. The blood patch in his farm where he led police to confirm it was the scene of killing.
3. The recovery of the body parts in the toilets, again accused is the one who led police to the recovery.

These are however negated by:-

- a. Lack of evidence as to who those body parts actually constituted.
- b. The co-relation between the blood on the floor, in the field and the panga recovered from accused's house, to the body parts.

For circumstantial evidence to form a basis for conviction there must be no other existing circumstances

weakening the chain of circumstances. Unfortunately, much as there is every probability that accused killed Kimani, the loopholes I have pointed out weakens that chain and he must benefit from those loopholes – which make the prosecution case to lack proof beyond reasonable doubt. This was the decision made by the Court of Appeal in **OUMA V R (1986) KLR** pg 619 that:-

“At the time of evaluating the prosecution’s evidence, the court must have in mind the accused person’s defence and must satisfy itself that the prosecution had by the end left no reasonable possibility..... if there is doubt, the benefit always goes to the accused.....”

That is what the loopholes I have pointed out have done in this case – it creates the benefit for the accused and the evidence tendered does not prove the case beyond reasonable doubt and I return a finding of **NOT GUILTY**.

The accused shall be set at liberty forthwith unless otherwise lawfully held.

Delivered and dated this 10th day of December, 2013 at Nakuru.

H.A. OMONDI

JUDGE