REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Murder Case 100 of 2009

REPUBLIC……...……PROSECUTOR

VERSUS

MICHAEL MUNYAKA KURIA…….ACCUSED

JUDGMENT

Michael Munyaka Kuria is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. He is alleged to have murdered Joseph Kariuki Karugu on 29/11/09 at Ndimu farm, Kuresoi District, Rift Valley Province. The accused person denied the offence. In support of their case, the prosecution called a total of seven witnesses. In his defence, the accused gave sworn testimony but did not call any other witness.

John Macharia Muharia (PW1) told the court that he was in his house on 29/11/09 at about 9.30 p.m., when he heard noises like that made by drunkards outside his gate which is next to the Tegea trading centre. He went and stood near the gate facing the Tegea trading centre because his land adjourns the shops. From about 100 metres away, he saw two people walking from the centre. He was able to see the people because there are street lights at the centre. From his hiding place near the gate he saw the accused whom he knew well, holding the hand of another man whom he did not know. He knew the accused well including his parents. As they were near PW1's gate about 15 metres away, the accused told the person whose hand he was holding that he would know that people of Tegea do not play games. At that juncture, PW1 emerged from his hide out and stood where the people could see him. PW1 saw the man that was being pulled along by accused looking very drunk and only responded to what he was told by saying 'yes'. The accused saw PW1 and told him that he was the chief of the area and they continued towards the accused's home which was about 120 metres away. When they disappeared, PW1 went to sleep. On the next day at 6.30 a.m., PW1's phone rang and on picking it, he was told that near Chege Wanjiru's home, there was a dead person. The person refused to disclose his identity. He called Chief Joseph Makori and informed him of the information received. He went to the chief's home and found people gathered. He did not know the deceased but saw a red sweater which the person he had seen with the accused the previous day, wore. He did not tell anybody what he had seen but watched the accused keenly. He saw the accused leave and go towards his home. When the police arrived at the scene, PW1 informed the OCS of what he had seen the previous night. PW1 was given two officers who went to accused's home, they searched accused's house and recovered ½ kg of bhang. PW1 said that the deceased's body was about 200 metres after passing the accused's gate and he suspected the accused to be the culprit because he saw them together the previous night.

Silas Mukunya Njoroge (PW2), a resident of Tegea recalled that on 29/11/09, he was at Tegea centre about 6.00 p.m. He met Munyaka, the accused, at about 7.00 p.m., they went together to Wasia Pub, the accused bought him some alcohol and left PW2 at the Pub. PW2 left for his home about 8.00 p.m. When taking tea at his home, he heard the accused call him. PW2 opened the door for accused, but he did not enter. PW2 saw accused in company of somebody else. The person wore a red sweater. He said the accused was with the person who was killed. He used to see the deceased doing casual jobs in the area. Next day at 8.00 a.m., he was informed that somebody had been killed.

Peter Ngugi Waithera (PW3) recalled that he was with the deceased in his farm on 29/11/09; that the deceased used to do for him casual jobs. He paid the deceased at 1.00 p.m. and he left but was supposed to come back next day. On 30/11/2009, he was informed that the deceased had been murdered. He went to the scene and noted that the deceased's neck was nearly severed, a stab wound on the stomach and the private parts were severed.

John Chege Kiguni (PW4) told the court that he knew the deceased who was a neighbour in Piavi. He said that on 29/11/09, he was doing casual jobs in Kuresoi. He lived in the same house with the deceased. They left work at 1.00 p.m. when the deceased left, claiming he was going to buy nails at the centre for constructing a house. That evening when PW4 went back home, he did not find him.

Milka Wangui (PW5) is the mother of the deceased. She said that the deceased left home on 27/10/09 and on 29/11/2009, she got a report of his death. She identified the deceased's body before post mortem was done.

PC Isaac Nyakunu (PW6) of Kuresoi Police Station recalled that on 30/11/09, he accompanied the OCS to the scene of a murder in a potato farm. The scene was disturbed and the crops destroyed. He observed the deceased's body and saw a deep cut on the neck, cut wound on the stomach. There was blood at the scene. PW6 recovered a sweater from the deceased at the scene. The body was removed to Molo District Hospital. He received information from the Assistant Chief that the deceased had been with one Michael Munyaka the night before. The Assistant Chief led them to the suspect's house about 10.00 a.m. from the scene. They found the suspect washing clothes. They took him. The accused's house was searched, cannabis sativa was recovered. They inspected the clothes he was washing but they found nothing relevant. He produced the sweater recovered on the deceased as PExh.1.

Dr. Magari Gikeni (PW7) of Molo District Hospital produced the post mortem report that was filled by his colleague, Dr. Ithondeka who performed post mortem on the deceased. The doctor had found that the body was of a male adult; that the head was partially severed exposing the vessels, rope marks in three lines over upper abdomen with bruising and a partially amputated penis. The doctor formed the opinion that the cause of death was the partially severed neck, secondary to penetrating injury with features of partially amputated penal shaft (PExh.2). A P3 was also produced. A form P3 in which the accused was examined and found fit to plead to the charge was also produced as PExh.3.

The Accused person was called upon to defend himself. He gave a sworn statement in his defence. He said that on 29/11/2009, he worked in the farm, about 1.00 p.m. he went to Tegea shopping centre, met friends and they went to drink alcohol at Wasia bar. The deceased was also there. They took alcohol till 8.00 p.m. and he left to go home. He left with Joseph Kamithi, passed by Cyrus Mukunya's house (PW2) and headed home. On the way the deceased said he had a job to do for the next 3 days. When the accused reached the gate to his home, he entered and went to sleep while the deceased continued on his way home. He said the deceased's home was about 300 metres ahead of his and that they used to drink together and walk home together. He learnt of the deceased's death next morning on 30/11/2009. He was later arrested for the murder and charged. He denied killing the deceased.

Having heard both the prosecution and the defence, there is no dispute that the deceased was in company of the accused on the night that deceased was murdered. The accused was the last person to be seen with the deceased. The accused admits that they walked home together and parted as the deceased walked further to his home. Nobody witnessed the murder. The prosecution case therefore turns entirely on circumstantial evidence. The law on circumstantial evidence is well settled.

In **Peter v R (1952) AC at Pg 489**, Lord Marned said:-

"circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another …. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

In **Rep. V Kipkering Arap Koske & Another (1949) 16 EACA 15,** the East African Court of Appeal held that for circumstantial evidence to found a conviction:-

"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."

Later on, Court of Appeal said this in **Omar Chimera v Rep Cr. App. 56/1998**:-

"it is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i) These circumstances should be of a definite tendency unerringly Pointing towards the guilt of the accused;

ii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."

In the instant case, the accused was with the deceased on the night that the deceased met his death. PW1 saw them pass by his house together and they passed by PW2's house at about 8.00 p.m. In such a case, where the accused was the last person seen with the deceased before the deceased was found lying in a potato garden with his throat slit open, the reasonable presumption is that the accused is the only one who could have known what happened to the deceased. **Section 111(1)** of the **Evidence Act** comes into operation. It states:-

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemptions from, or qualifies 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."

The accused was the person last seen with the deceased and it is upon him to explain what happened to the deceased. The accused's explanation is that he parted with the deceased when he reached his home as the deceased's home was further ahead. PW1 and the Investigating Officer (PW6) confirmed that the accused reached his home first and the deceased lives 200 to 300 metres ahead. The accused's explanation that he reached his home first and left the deceased to continue is plausible.

The only question that arises is the evidence of PW1 who said that when he saw the accused and the deceased on that night, the accused was pulling the deceased and that accused uttered the words that the deceased would know that the people of Tegea do not play. That statement, does not tell us much or what the accused intended to do because the accused and the deceased had been to PW2's house on that night and they were not quarrelling. The words allegedly uttered by the accused in my view cannot amount to threats unless there is other evidence to confirm that the two had disagreed and that the statement made by the accused was directed at the deceased.

According to PW1 and PW2, the deceased was drunk but it seems the accused had not drunk much (PW1 & 2). If indeed the accused had been dragging the deceased along, one wonders whether the deceased was able to proceed home alone. And since the deceased's home was only 200 to 300 metres away one wonders how come the accused never heard screams or a commotion. These are questions that raise suspicion against the accused person but they do not go to prove his guilt. Having found that the

explanation given by the accused is plausible in the circumstances, a doubt is raised as to whether it is the accused person who murdered the deceased and that doubt must resolved in his favour. The accused is acquitted of the offence of murder under **Section 322(2)** of the **Criminal Procedure Code**. He is set free forthwith unless otherwise lawfully held.

DATED and DELIVERED this 17th day of May, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Omari for the State.

Mr. Tombe for the accused

Accused - present

Kennedy – Court Clerk