



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CRIMINAL CASE NO. 36 OF 2006.

REPUBLIC.....PROSECUTOR.

VERSUS

PETER KEPKEMOI

MARINDANYACCUSED.

JUDGMENT

1. The accused person **Peter Kepkemoi Marindany** is charged with the offence of murder contrary to the provisions of section 203 as read with section 204 of the Penal Code. The particulars of the charge state that on the nights of 14th and 15th September, 2006 at Weyeta farm in Trans Nzoia District within Rift Valley Province, he murdered **Charles Marindany**. The prosecution called a total of 15 witnesses who gave evidence in support of the charge. After the close of the prosecution's case, the accused person was put on his defence. He gave unsworn statement of defence and called three witnesses who gave evidence in his defence.

2. Briefly the prosecution's case was supported by the evidence of the mother of the deceased **Regina Chepngeny Marindany** (PW2), her son, who is also the brother to the deceased **Patrick Marindany** (PW1) and her daughter, **Mercy Chepkoskei Marindany** (PW3) also the sister of the deceased. The three testified that there existed an old dispute over the control of family property between their family, that is the 2nd house and the accused person who was from the 1st house. The deceased's father, who is also the father of the accused person, was polygamous. He was married to three wives, PW2, was the 2nd wife, the mother of the accused person was the 1st wife, and there was a third wife who did not have children. The deceased father died in 1994 leaving his parcel of land at Kipsaina a portion of that land was planted with tea. When the father of the deceased passed away, these three witnesses testified that it was the accused person who took over the tea bushes and the lion share of the other portion of land leaving only 1 ½ acres for PW2 from where PW2 was growing maize to support her family. This parcel of land was the cause of dispute between the accused person and the deceased.

3. It is evident that this dispute between the accused person and the deceased family was adjudicated upon before the provincial administration and also before **Sammy Kipkemoi Kurgat** (PW4) who was the chief of the area and also a relative by marriage to the accused person (PW4's sister is married to the brother of the accused person) PW1, PW2 and PW3 testified that on the night of 14th September, 2006 the

deceased confided with them how he had confronted the accused person over the proceeds from the tea bushes. The deceased person was concerned that the accused person did not share the tea proceeds, and for keeping the proceeds, the deceased's siblings had dropped out of school. According to these witnesses, the deceased told them the accused person threatened him with death.

4. They testified that as the deceased was narrating that incident, he was sobbing and saying that should he die, his siblings should know he died because of the property that their father left and they should remain united. On the morning of 15th September, 2006, these witnesses were woken by a worker who reported that there was an invasion by thugs and the deceased was shot. They went to the deceased's house which was separated from the main homestead and was used to house workers and found the deceased's body lying on the floor in a pool of blood. He was already dead.

5. **Abbel Onyango Marindany** PW11 testified that at the material time when this incident took place, he was living with the accused person who had employed him as a *shamba* boy. PW11 was related to the accused person because his grandmother was the sister to the accused person's step mother and somehow PW11 was expected to inherit the estate of the accused person's father as the heir of the 3rd house. **PW11** used to refer to the accused person as the uncle. On the material day, at about 9.00 p.m. he testified that the accused person called him to accompany him somewhere but the accused person did not reveal the place where PW11 was supposed to take him. The accused person was armed with a spotlight and they both went to the deceased's homestead and proceeded to the house where the deceased used to stay. The accused person knocked at the door and ordered the deceased to open. However, the deceased hesitated and the accused person kicked the door open and entered the house.

6. PW11 told the court that he heard 2 gunshots; thereafter the accused person emerged from the house and told PW11 that they should leave the scene. While on the way, PW11 enquired from the accused person whether he had shot and killed the deceased but the accused person said he had just injured him a little. They went home and the next day PW11 was awoken by people screaming, he proceeded to the deceased's home where they found many people. The deceased was found lying dead with gun shots; the police arrived and took away the body of the deceased. During investigations, PW11 was also arrested and detained at *Moi's Bridge* police station but later on, the police decided to release him and make him a prosecution's witness

7. Another piece of evidence that alluded to a ranging acrimony between the deceased person and the accused person was given by **Senior Sergeant Komoro**, PW10, who was stationed at Kipsaina police post as the OCS in September, 2006. He told the court that on 12th September, 2006, the accused person who was a superintendent of police sent for him. PW10 went to the accused person's residence where he found the accused person working in his bar which was adjacent to his residence. The accused person reported to PW10 that the deceased was of suspicious character as he was involved in crimes. It was suspected that the deceased may have committed crimes within Kibomet area together with another Turkana person who might have been released from jail. The accused person asked PW10 to follow the movements of the deceased person. PW10 was surprised when on the morning of 15th September, 2006; the deceased's brothers reported that **Charles Kiprono** was shot dead. PW10 reported the matter to the divisional headquarters. He proceeded to the scene and recovered 2 spent cartridges which were produced as Exhibit No. 14.

8. The other set of evidence is regarding the investigations that were mounted by the police led by Acting Superintendent of Police **Issa Mohamed Muhamoud** PW15. The death of the deceased was reported to Kipsaina Police Post and **PW15** took over the directions of the investigations. Statements were recorded from the family of the deceased. The police searched for the murder weapon within the compound but when none was found, it was decided that the search should be extended to the home of the

accused person as preliminary evidence at the time, was pointing at the accused person as a suspect. **Cpl. Richard Mwaura, PW5**, who was at the time attached at CID headquarters within the Special Crime Prevention Unit, was instructed to assist with the recovery of the murder weapon. He deals with advance detection and operates detection equipment.

9. On 15th September, 2006, he was assigned duties in Kitale. He met with PW15 who took him to the scene of murder to help them locate the murder weapon. He was taken to the home of the accused person and explained to the accused person that he intended to search his compound for ammunition. The accused person strongly objected to the search saying that he did not have any firearm. PW5 asked the accused person to accompany him to the house and after using the detector equipment there were signals that indicated the detection of ammunitions. The signals pointed at the sitting room of the accused person's main house. The police officers following the signals searched the room, they recovered a polythene paper bag which contained several ammunitions, six live bullets of 9mm, two live bullets of .38 special caliber and 2 expended cartridges of 9mm. These were found in a paper bag that was hanging by a nail on the wall of the sitting room.

10. The signal continued to point at the bedroom. There were several boxes and when the accused person was asked to open the boxes, inside one of the boxes they recovered one live bullet of 9mm. They went on with the search and the detector pointed at water well. However, the well was deep and it was having water, therefore the search became complicated, the search went on for two days. After several unsuccessful attempts to empty the water from the borehole, the fire brigade was called from Eldoret on 17th September, 2006, **James Aura Auka** PW7, who was at the material time working with the fire brigade of the Eldoret Municipality testified how he was called to rescue and recover some weapon from a well. After pumping water from the well, he descended inside the well and recovered a pistol covered into a polythene paper.

11. The pistol was handed to PW15 who prepared the exhibit memo and forwarded them to Chief Inspector **Emmanuel Langat** PW9, a forensic and Ballistic expert based at the CID headquarters. He received the following exhibits;

- (i) *Two expended cartridge cases in caliber .45 inches marked A1 and A2.*
- (ii) *Two expended cartridge cases in caliber 9 mm parabellum marked B1 and B2.*
- (iii) *Two rounds of ammunition in caliber .38 inch special marked CI to C2.*
- (iv) *Seven rounds of ammunition in caliber 9mm parabellum marked DI to D7.*
- (v) *Three rounds of ammunition in caliber 7.65mm marked E1 to E3.*
- (vi) *One cleaning rod marked F.*
- (vii) *One alignment binocular marked GI.*
- (viii) *One US colt pistol serial number 1767241 marked K-1.*

(ix) One magazine marked K-2.

12. PW9 testified that the US colt pistol that he received for testing was in good mechanical condition and it was capable of firing. He successfully test fired it and he formed the opinion that the spent cartridges .45 inches which were recovered from the scene were fired from the pistol. **P.C. David Kipchumba** PW14 also worked hand in hand with PW15 who was the team leader. He also took several photographs at the scene covering the entire operation and produced a total of 20 photographs which he took at the scene, he developed them and they were produced in court as exhibits. The other evidence was by police officers who guarded the scene while the investigations were going on.

13. The post mortem examination was carried out on the body of the deceased at Kitale District Hospital by **Dr. Ruto** who could not attend court but the report was produced by **Dr. Donald Mogoi**. According to the post mortem report, the deceased's body had two bullet injuries and the cause of death was cardio respiratory arrest due to the bullet shot on the chest which caused massive hemorrhage. The body of the deceased was identified by PW2. The accused person was subjected to a mental examination and was found fit to stand trial.

14. Put on his defence, the accused person gave unsworn evidence. He narrated that on 14th September, 2006 he spent the whole day working and supervising work in his *shamba*, he was in the company of his workers. In the evening, he worked at his bar which is within the precincts of his residence. He had several customers whom he served with drinks up to midnight. When he closed the bar business he summoned his watchman who escorted him home. The watchman's name is **James Ekadel** who testified as DW2. DW2 confirmed that he escorted the accused person on the 14th September, 2006 at about midnight to his home. DW2 said he left after the accused person had entered the house. The following morning DW2 heard people wailing from the direction of the accused person's step mother's home. He woke the accused person and they went to the scene.

15. Further evidence was given by **Jack Kinyara, DW3**, who confirmed that he was drinking alcohol at the accused person's bar. The customers were being served by the accused person himself. He was the last customer when the accused person closed the bar between 11pm and midnight on the material day. He told the court that he saw the accused person closing the bar and was being escorted by his watchman. The last defence witness was **Bramwel Wabomba Mwimani, DW4**. He testified that on 14th September, 2006 he was hired by the accused person to paint for him the house. He finished the work at about 5.30 p.m. He passed by the bar of the accused person and after taking a drink, he proceeded to his home in the company of **Abbel Onyango** PW11. They visited another home with PW11 where there was a funeral wake of a neighbor. According to DW4, he and PW11 stayed at the funeral wake until 1.00 a.m. after that, they returned to DW4's home where they slept until morning. They left the following morning, and when they reached the accused person's home, they didn't find the accused person but they were informed that thugs had broken into the home of the accused person's step mother and shot his step brother, so they all went to the scene.

16. Both counsel for the accused person and the prosecution's counsel made extensive submissions in support of their respective positions. **Mr. Onyancha**, learned counsel for the accused person submitted that there was no credible evidence to link the accused person with the murder of the deceased. He urged the court to disregard the evidence of **Abbel Onyango, PW11**, which was contradictory and lacking in common sense because the accused person is a senior police officer and it beats commons sense to take a witness to the scene, commit murder and walk away. Moreover, going by the evidence of PW11, he should have been treated as an accompish, he had been arrested to help the police with investigations and police choose to make him a witness. The court was urged to consider that PW11 was a nephew of the accused person and he was in the centre of controversy regarding the land dispute.

17. Regarding the investigations and the recovery of the pistol at the accused person's home, the pistol was said to be .45 inches while the cartridges that were recovered at the scene were booked as .45 mm. However, these cartridges were not the ones which were forwarded for ballistic examination. It is possible the pistol and spent cartridges were swapped to make up the prosecution's case. It is further instructive that the bullet that was recovered in the body of the deceased was never sent to the ballistic experts. The report by the ballistic expert was also faulted for failure to give diametric evidence of the point of entry of the bullet and the point of exit. The investigations were also faulted because the accused was placed in police custody on 15th September, 2006. The borehole where the pistol was found was not sealed, and it was not also swept for finger prints. According to **Mr. Onyancha**, there were also several gaps because the person called Mr. Mogaka and another young man who informed PW2 of the death of the deceased were not called as witnesses.

18. On the part of the state **Mr. Onderi**, learned counsel for the State submitted that the prosecution's case was proved beyond the reasonable doubt through the evidence of the 15 prosecution witnesses. He urged the court to take into consideration the evidence of PW11 who saw the accused person commit the offence. It is also common ground that the accused person was at the time on a 72 days leave when the offence occurred. The evidence of PW1, PW2 and PW3 confirmed that there was bad blood between the accused person and the deceased regarding a dispute over the family property since their father died. The deceased prepared supper for PW1, PW2 and PW3 and shared with them how he had been threatened with death by the accused person. The evidence of bad blood is also confirmed by PW4, who had also participated in the arbitration in his capacity as the chief of the area, PW10, the OCS Kipsaina police post. According to the state counsel the accused had a motive to take away the life of the deceased and also the opportunity to do so.

20. This case was tried with aid of three assessors; it was duly summarized to the three assessors who returned a unanimous verdict of not guilty. Apart from the defence evidence, which I recorded, the prosecution's evidence was heard and recorded by my **Ochieng J.** Upon evaluation of the prosecution's evidence, I find there are serious gaps that were left especially when PW1, PW2 and PW3, testified that on the fateful night when the deceased was murdered, he prepared supper but retired to his house to eat with a friend, this is the last time the three witnesses said they saw the deceased person because the next day the deceased body was found lying on a pool of blood after he was murdered.

21. These witnesses further testified that a worker by the name David Mogaka is the one who awoke PW2 and informed her that they had been invaded by thugs and when PW2 ran to the workers house, she found the body of the deceased at the corner of the house. This person by the name Mogaka was a crucial witness as it is on record that the deceased was sharing the house where he used to live with the workers. The question that lingers in my mind was whether the deceased was alone at the time he was murdered or whether he was with a friend with whom he shared his food or the worker by the name Mogaka. The evidence of PW11, who claimed to have been an eye witness also, has to be looked at carefully. Firstly in the face of the defence evidence by DW4, this witness gave an account of how he was in the company of PW11 from 5pm on the 14th September 2006 up to the next morning when they both learnt of the death of the deceased. According to DW4, he in the company of PW11 attended a funeral wake, up to about 1am after which they retired to sleep in his house. The following morning they left together for the accused person's house.

22. The court is faced with the dilemma on whose evidence to believe, PW11, or DW4? It is also vital to consider the circumstances under which PW11 became a prosecutions' witness, he had been arrested and was remanded in police custody for a period of one week, thus in law, his evidence can be treated as evidence of an accomplice. The principles to guide the court on how to deal with the evidence of an accomplice have been settled in a long line of decided cases by the Court of Appeal, notable among them is the case of;

Wanja Kamau Vs Republic {1965} EA 502 in which the East Africa Court of Appeal held;

“While a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice but the weight to be given to such person’s evidence should vary according to the reason for the acquiescence; if the acquiescence was based on approval of the crime, the evidence should be treated as no better than that of an accomplice; if, however, the acquiescence was based on indifference, the evidence should be treated with considerable caution; but if the acquiescence was a result of fear then there is no reason why the evidence should not be relied upon.”

23. Apart from PW11 having been an accomplice, that is going by his evidence that he accompanied the accused person when the accused person allegedly shot the deceased in cold blood. This evidence does not meet the test of common sense. It does not make sense that the accused person a Senior Police Officer, who was well known to PW11, and knew every corner of his step mother’s compound, could seek the company of PW11 to merely accompany him as he committed a crime. Moreover, this evidence of PW11 has to be taken with that of defence witness **Bramwell Wambomba** (DW4) who said they were with PW11 throughout the night. In view of the fact that PW11 was arrested and kept in custody before he was made a prosecution witness, I would treat his evidence with suspicion and in the light of the evidence of DW4 I would disregard his evidence altogether.

24. This now leads me to the evidence of recovery of the firearm at the home of the accused person. The pistol that was allegedly retrieved from the compound of the accused person was submitted for ballistic expert, this was a .45 inches US colt pistol. Also submitted for examination were some two spent cartridges which were recovered from the scene of murder. These cartridges were initially booked at the Kitale Police Station under an OB which was produced as exhibit No. 14. They were booked as .45mm which are two different cartridges. According to the ballistic expert, the pistol that was recovered from the accused person’s well could only discharge .45 inches of cartridges. This aspect was never reconciled. A post mortem examination of the body of the deceased was carried out and a bullet which was lodged in his body was retrieved, this bullet was however not subjected for ballistic examination. If this was done, it could have resolved the issue of whether the pistol that was recovered in the accused person’s well was the one used to murder the deceased.

25. The process of recovery of the pistol was conducted for about 3 days. Firstly the cover of the well was not locked, and it was within an open compound which was accessible to other people apart from the accused person. Moreover, during the search and the recovery of the pistol, it is not clear whether the well was sealed and fully guarded. Thus having ruled out the evidence of PW11, the only evidence remaining is circumstantial. This circumstantial evidence does not only point at the accused person as the only one who had the opportunity to murder the deceased. In view of all the above gaps noted in the prosecution’s evidence, I entertain doubts in my mind that it is the accused person and non other who murdered the deceased person.

26. Taking the totality of the evidence before court, there are serious doubts in my mind whether it is the accused person who murdered the deceased. For the aforesaid reasons, I concur with the assessors that the accused person is not guilty and I hereby acquit him of the offence of murder.

Judgment read and signed this 20th day of May, 2011.

M. KOOME.

JUDGE.