



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL CASE 21 OF 2004

REPUBLICPROSECUTOR

VERSUS

D B K K CACCUSED

JUDGMENT

The accused, **D B K K C** was charged with two counts of **murder** contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence were that on the night of 12th and 13th April, 2004, at [particulars withheld] in Kericho District, the accused murdered R C K (*hereinafter referred to as the 1st deceased*) and A I K (*hereinafter referred to as the 2nd deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called seven witnesses in its bid to establish the charge against the accused. After the close of the prosecution's case, the court put the accused on his defence. The accused gave an unsworn statement saying the allegation that he had committed the offences that he was charged. He gave an alibi defence. He stated that he was elsewhere at the time the offences were committed and therefore could not be held criminally liable.

After the close of both the prosecution's and the defence case, Mr. Onga'anyi for the accused made closing submissions on two broad grounds: the first ground was that the accused's fundamental rights were infringed when he was arrested and placed in police custody for a period of more than fourteen (14) days as provided under **section 72(3) (b)** of the **constitution** before he was arraigned in court. He submitted that the court had an obligation to enforce the accused's fundamental rights as enshrined in the constitution by acquitting him of the charge. The thrust of the second limb of his submission was that the prosecution had failed to establish its case on the charge of murder against the accused person to the required standard of proof beyond reasonable doubt. He submitted that the prosecution had not displaced the alibi defence that was offered in evidence by the accused.

On his part, Mr. Koech for the state submitted that the prosecution had adduced overwhelming evidence which established the guilt of the accused on the charges preferred against him to the required standard of proof beyond reasonable doubt. He submitted that the circumstantial evidence adduced by the prosecution witnesses established that it was only the accused, and no one else, who had the motive and the opportunity to commit the offences. He submitted that the accused's fundamental rights were not breached as alleged because the accused appeared before the Deputy Registrar of the court on the 15th day of April, 2004 a day after the mandatory period of fourteen (14) days had expired. He urged the court to take judicial notice of the fact that at the material time, Kericho High Court was a circuit High Court and

did not have a resident judge. He submitted that the accused had been brought before to court within a reasonable time taking into consideration the fact that the accused was arrested by police officers based at a different police station other than that the one which the unlawful killing of the deceased persons was reported. He urged the court to convict the accused.

Before giving reasons for this court's judgment, it is imperative that the facts of this case as was reconstructed by this court be set out. The accused was the husband of the 1st deceased, R C K. The accused was also married to a second wife, A K. The accused and his two wives lived in the same farm at [particulars withheld] in Kericho District. The accused and the 1st deceased were blessed with six (6) children, who included PW2 K P K (*adult son*), PW4 B K K (*who was sixteen (16) years of age at the time he testified in court*) and the 2nd deceased who was aged five (5) years at time of his death. According to PW2 and PW4, on the night of 12th April, 2004, at about 8.00p.m they eat supper at their mother's (1st deceased) kitchen. PW2 recalled that they ate supper at the said kitchen with the 1st deceased, the 2nd deceased and a young girl called F C who was about seven (7) years of age. According to PW2, his father (the accused) came out of the door of the kitchen while carrying a torch and a radio. The accused had switched on the radio. He testified that the accused went to the main house and was later served supper by the 1st deceased. PW2 testified that after taking supper, he went to sleep at his house. His house was about 20 meters from his parents' homestead. PW4 testified that he last saw his father (*the accused*) on 11th April, 2004 when he informed him that he was going on a journey.

Although the accused questioned the veracity of PW2's recollection of what transpired on the material night (*i.e. that it could not be possible that he saw accused as alleged*), having evaluated the testimony of PW2 as compared with the alibi defence offered by the accused, and having observed PW2's demeanour as he testified in court, I believed he was a truthful and honest witness. His narrations of the events that took place on the material night was such that he gave a blow account of what took place on the material evening. I did not find any credit with the accused's assertion that he was away from his home on the material evening. I believed PW2's testimony when he stated that he saw his father on the material evening and in fact recalled the 1st deceased serving (*the accused*) him with supper. I did not buy the submission made by counsel for the accused that the 1st deceased could have served supper on some phantom individual. The 1st deceased could only have served supper to her husband, the accused. PW4 testified that after eating supper, he also went to sleep in a different house than that of PW2.

According to PW2, when he woke up on the following day, he went to his step mother's to take breakfast. He walked past his mother's house and saw that the doors to the kitchen and the main house were locked. He went to his place of business located nearby where he operated a food kiosk. As he was walking to his place of business, he met with his brother (PW4). He informed him to go to their mother's house and wake her up. According to PW4, he went to his mother's house about 7.00a.m. He saw the door to his mother's house locked from the outside with a latch. He opened the door and went inside the house into the bedroom. He was shocked to see his mother (1st deceased) lying on the bed with severe cut injuries on her head and neck. The 2nd deceased was lying next to the 1st deceased with similar cut injuries on his head. The 2nd deceased was dead. PW4 testified that although the 1st deceased was alive at the time, she was barely hanging on dear life. He raised alarm. PW2 and other neighbours arrived at the scene. PW2 made a report to the nearby D.O's office. The 1st deceased was rushed to hospital, where she succumbed and died from her injuries. PW2 and PW4 testified the family axe, which was blood stained, was found at the scene. They also found the radio in the bedroom. According to PW2, the radio that he had seen in possession of the accused the night before was the one at the bedroom. The radio was still switched on.

A report was made to the police at Kericho police station. According to PW7 PC Arthur Mwangi, the then O.C.S. of Kericho police station, CIP Gitonga, PC Rotich, the scene of crime officer, PC Arende and himself visited the scene of crime. They visited the scene of crime on 13th April, 2004, a day after the incident. PW7 recalled that on arrival at the scene, they found the body of the 2nd deceased lying dead on its mother's bed. PC Rotich took the photographs of the body of the deceased after which the said body of the 2nd deceased was removed and taken to Kericho district hospital mortuary. PC Rotich visited the

hospital and took photographs of the body of the 1st deceased at Siloam hospital where the said deceased had succumbed due to her injuries. PW7 testified that both bodies of the deceased person had injuries which were consistent with injuries inflicted by a sharp object. The photographs taken by PC Rotich were produced in evidence by PW7 as prosecution's exhibit No. 4. PW7, as the investigating officer, commenced investigations and recorded the statements of the witnesses. He testified that since the accused was not seen after the incident, word was put out that should the accused be seen, he should be apprehended and taken to the police station. He testified that post mortem were performed on the bodies of the deceased person on 15th April, 2004 by Dr. Sigilai.

On 30th May, 2004, while PW7 was at Kericho police station, PW7 received information that the accused had been arrested at Kapkatet area by APC Paul Kirui and APC Erustus Morege then attached to the Kapkatet D.O's office. The accused was arrested by the said officers after receiving information from PW5 C K B, a lorry driver, and a neighbour to the deceased persons at [particulars withheld]. PW5 had seen the accused chatting with a woman by the road side near Kaplong trading centre. Pw5 testified that he had been notified of the offences that the accused had allegedly committed. He recalled that his area chief requesting the residents of the location that should the accused been seen, they should inform the nearest police station so that the accused could be brought to book.

PW6 Dr. Athanasius Kasera Ochieng' produced the post mortem report prepared by Dr. Sigilai on examination of the bodies of the deceased persons. According to PW6, on externally examining the body of the 2nd deceased, he noted that the 2nd deceased had sustained multiple skull lacerations with a visible fracture of the right parietal region of the skull. The lacerations were running over to the right cheek. There was a superficial laceration over the shoulder. On internal examination of the head, there was a deep penetrating cut through the skull to the brain. There was a tear on dura matter. Brain tissue was oozing through the cut injury. Dr. Sigilai formed the opinion that the 2nd deceased died due to severe hemorrhage and severe head injury. On the same day, Dr. Sigilai examined the body of the 1st deceased. On external examination he noted multiple skull lacerations on the parietal skull and the frontal lobe. There was another laceration below the chin. On internal examination, he noted a trans-parietal laceration with fracture of the parietal skull. Brain tissue was oozing from the site of the fracture. There was a superficial degleving injury on the chin. He formed the opinion that the 1st deceased died due o massive hemorrhage and head injury. The two post mortem reports were produced as prosecution's exhibit No. 1 and 2 respectively. The accused was examined by Dr. Sigilai on 4th June, 2004. He formed the opinion that the accused was mentally fit to stand trial. The duly filled p3 from was produced on behalf of Dr. Sigilai by PW6 as prosecution's exhibit No. 3.

When the accused was put on his defence, he gave an alibi defence. He gave an unsworn statement in his defence. He did not call witness. He testified that he was not at his home on the night the deceased persons were fatally assaulted. He testified that he left his home on 11th April, 2004 and traveled to Nakuru where he spent a couple of days before proceeding to Nairobi. He told the court of his visit to Nairobi was a pursue his terminal dues or retirement benefits from his former employer, the Teachers Service Commission. After spending a day in Nairobi, he traveled back to Nakuru and proceeded to Njoro where he had previously acquired a farm. While at Njoro, he told the court that he fell ill and sought medical attention from a traditional herbalist in Narok. He testified that he was treated for a period over a month until he regained his health. On 30th May, 2004 he traveled back home. He was surprised when he reached Kapkatet trading center, and was arrested by tow administration police officers. The officers alleged that he was wanted for a crime that he was not aware of. He told the court that upon being transferred from Litein police station to Kericho police station, it was when he informed that he was required to answer the present charge. He denied that he had caused the death of the deceased persons. He told the court that he had been charged with an offence which he had no knowledge of.

After the close of both prosecution's and the defence case, as stated earlier in this judgment, counsel for the accused made submission that, in view if the breach of fundamental rights of the accused as enshrined under section **72 (3) (b) of the constitution** i.e. that the accused had been detained for a period exceeding the statutory period of fourteen (14) days, the court should acquit the accused without delving into the merits to otherwise of the prosecution's case. Mr. Ong'anyi cited the several decisions of the High Court

in support of this submission that the accused should be acquitted on the grounds of failure by the prosecution to present the accused in court within the required period without any reasonable cause. Mr. Koech for the prosecution submitted that the prosecution had not breached the fundamental rights of the accused as the accused was taken to court within a reasonably practicable time.

I have carefully considered the said submissions in regard to the alleged breach of the fundamental rights of the accused. **Section 72(3) (b)** of the **constitution** provides that any person that is suspected of having committed a non-bailable criminal offence, shall be presented to court as soon as is reasonably practicable which shall not be beyond fourteen (14) days. In the present case. The fact relating to the circumstances of the arrest and arraignment to court of the accused are in not dispute. The accused was arrested on 30th May, 2004. The record of court shows that the accused was presented before the Deputy Registrar of this court on 15th June, 2004, the Deputy Registrar made a note that the accused should be presented before the judge on 6th July 2004. as correctly pointed out by Mr. Ong'anyi, the record does not disclose the name of the Deputy Registrar or the fact whether the accused was present in court at the time the order was made. This court takes judicial notice of the fact that the handwriting of the Deputy Registrar appears to be that of Mrs. S. Muketi, the then Deputy Registrar of this court at Nakuru. The accused was presented before Muga Apondi J on 1st July, 2004. The accused pleaded not guilty to the charge. Assuming that this court was to accept the submission to the Deputy Registrar on 15th June, 2004, the accused was then presented to court a day after the expiry of the statutory period of fourteen (14) days.

Mr. Ong'anyi presented to court two decisions of the court of Appeal namely **CA CRA No. 270 of 2006 Tajiri Kalume Kahindi vs Republic (Mombasa) (unreported)** and **CA CRA No. 140 of 11005 Maria Kitawa Mwavunde & annor. Vs Republic (Mombasa) (unreported)** where the Court of appeal held that the Deputy Registrar of the court had no jurisdiction to take any proceedings in a murder trial. I am in entire agreement with the above two decisions by the court of Appeal that affirm the statutory position granting exclusive jurisdiction to High Court to hear and determine murder cases. However, I am not persuaded by the thrust of Mr. Ong'anyi's argument made on behalf of the accused that since the accused was presented before the Deputy Registrar of the court, then such appearance did not, in law, amount to presentation of an accused person before a court of competent jurisdiction within the requisite statutory period of fourteen (14) days. It was clear that the accused was presented before the Deputy Registrar at the time for the purpose of mention of his case since at the time, there was no resident judge at Kericho. In the **Maria Kitawa Mwavunde** case (*supra*) the court of Appeal held at page 9 as follows:

“On the issue of the proceedings being conducted by a Deputy Registrar, there is absolutely no substance in that complaint. Apparently it is the practice in the High Court in Mombasa that persons accused of murder and committed to jail to await their trial are regularly produced before a Deputy Registrar for the purpose of mentioning their cases. It is this kind of mentioning the case before a deputy a Deputy Registrar which is now being designated as proceedings having taken place before the Deputy Registrar and on which an order to declare the trial a nullity and initio is sought. This court has ruled, time and time again that a mention under such circumstances does not and cannot amount to a trial. No witness appeared before the Deputy Registrar on any of the days that the matter was so mentioned and no sort of hearing took place before the Deputy Registrar”.

In the present, case it was evident that the accused was resented before the Deputy Registrar for the mention of his matter so that a date could be fixed when he would appear before the judge for the purpose of taking of the plea. The accused appeared before the Deputy Registrar in compliance with the law that requires an accused person to be presented to court within fourteen (14) day or a reasonably practicable period for the purpose taking of plea.

I am not persuaded by the argument presented on behalf of the accused that the accused was, by the fact that he was presented before the Deputy Registrar, therefore not presented before a court which had competent jurisdiction to hear the matter. The Deputy Registrar, as an administrative officer of this court, has jurisdiction, on a mention date, to fix the date when an accused person shall be presented to High Court for the taking of plea. This was especially so when it was clear that the Kericho High Court was by then being served by judges from Nakuru who scheduled hearing of the cases at he time convenient to

them when they would be present in Kericho. As stated earlier, this court took judicial notice of the fact that there was no resident judge in Kericho at the time. The prosecution made effort to present the accused before the High Court at Nakuru so as to beat the statutory deadline of fourteen (14) days. The fact that no judge was available at Nakuru to take plead on 15th of June, 2004 cannot, in the circumstances, be held against the prosecution. I therefore hold that the accused was resented in court on 15th of June, 2004 and not 1st July, 2004 as alleged forcefully submitted by counsel for the accused.

The other issue for determination in relation to the preliminary objection raised by the accused is whether the fact that the accused was presented to court a day after the mandatory constitutionally sanctioned period of fourteen (14) days had expired, rendered the subsequent proceeding null and void on account of breach of the accused's fundamental rights. On this point, there is no consensus. The Court of Appeal has rendered decisions which apparently has not settled the law. **For instance, in CA CRA NO. 120 of 2004 Albanus Mwasia Mutua vs Republic (Nairobi) (unreported)** and **CA CRA NO. 35 of 2006 Paul Mwangi Murunga vs Republic (Nakuru) (unreported)**, the Court of Appeal held that once it was established that an accused's fundamental rights had been breached by being presented to court after the expiry of the constitutionally sanctioned period of fourteen (14) days, the court is required to uphold the accused's fundamental rights by declaring subsequent proceedings null and void and of no legal consequence. The court held that once it was established that the accused had been detained for a period of more had fourteen (14) days before being presented to court, such an accused person was entitled to an acquittal irrespective of the nature of the charge brought against him.

In a more recent decision i.e. **CA CRA No. 217 of 2005 Dominic Mutie Mwalimu vs Republic (Nairobi) (unreported)**, the court of Appeal held that an accused person seeking to enforce his fundamental rights by invoking the provisions of **Section 72 (3) (b)** of the **Constitution**. Must raise the issues at the earliest possible opportunity so as to give the prosecution a chance to offer an explanation for the delay in presenting the accused person to court. I think, with respect, that the above decision by the court of Appeal is the correct exposition of **section 72(3) (b)** of the **constitution**. The fundamental right set out under **Section 72(3) (b)** of the Constitution is not absolute. Where the prosecution offers a reasonable explanation for the delay in presenting an accused person to court, the court will order the trial to proceed to its logical conclusion. In the present case, I hold that the prosecution presented the accused in court within a reasonable time taking into account the then prevailing circumstances i.e. that there was no resident judge in Kericho. I further hold that the accused was required to raise the issue regarding the alleged breach of his fundamental rights at the earliest possible opportunity so that the prosecution could be placed on notice and given ample opportunity to give an explanation. In the present case, the accused waited until the prosecution had nearly concluded its case, to raise the issue regarding the alleged breach of his fundamental rights. In my view, the issue was raised as an afterthought.

Now, to the merits of the case. In the present case, the prosecution solely relied on circumstantial evidence in its bid to secure the conviction of the accused. As was stated by the Court of Appeal in **Sawe vs Republic [2003] KLR 364** At page 372:

“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. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shift to the party accused”.

In the present case, it was the prosecution's case that the accused attacked the deceased persons with a sharp object causing them to sustain injuries which proved fatal. The accused offered an alibi defence. No one saw the accused commit the offence. There was no direct evidence connecting the accused to the crime. According to PW2, the son of the accused and the 1st deceased, on the material night of 12th April, 2004, at about 8.00p.m. he saw the accused while he was taking supper in the kitchen of his mother (*the 1st deceased*).according to PW2, the 1st deceased served the accused with dinner at the main house. PW4,

the other son of the 1st deceased, although present in the kitchen at the time, testified that he did not see the accused. PW2 was emphatic that he had seen his father (the accused) on the night of the 12th April, 2004. As stated earlier in this judgment, having evaluated the conflicting evidence adduced in this regard, I formed the opinion that PW2 was a truthful witness. The accused did not make any allegation against PW2 that would make this court have doubt in its mind that PW2 had other motives other than to truthfully narrate to the court what transpired on the material night. I believed PW2 when he testified that he had no doubt that his late mother served the accused with his dinner, on account of the fact that the 1st deceased served the accused with a specific plate that the accused used to eat his food. The evidence of PW2 places the accused at the house where the two deceased persons were found fatally injured. Although the radio, which PW2 testified was in possession of the accused on the material night, was not produced in evidence, the fact, the same radio was found next to the bed where the deceased persons were found lying after having been seriously injured with a sharp object, similarly places the accused person in the said house. The accused was nowhere to be seen on the following morning when the deceased persons were found having been fatally injured.

As stated earlier in this judgment, the accused offered an alibi defence. Was the alibi defence sufficient to displace the strong circumstantial evidence that placed the accused in the house where the deceased were found fatally injured? I do not think so. It was most improbable, even if the court was to believe the accused that he had gone on safari on 11th April, 2004, that the accused could have failed to communicate with his family for a period forty nine (49) days, from the time he embarked on his allegedly journey to the time that he was arrested on 30th May, 2004. The prosecution adduced evidence which was to effect that the accused's two wives lived with him at the farm at [particulars withheld]. There was no evidence to support the assertion by the accused that he had another farm a Mau which he was able to reside at during the material period that he was absent from home. In the present case, applying the dicta in the decision of **Malowa vs Republic [1980] KLR 110**, where the Court of Appeal held that the conduct of the accused in disappearing from the scene of crime after the commission of the offence in a bid to avoid arrest pointed to the guilt of such an accused person, I hold that the fact that the accused disappeared from his homestead on the day his wife and son were found fatally injured, corroborates the circumstantial evidence adduced by the prosecution, that it was indeed the accused and no one else, that had the opportunity and the motive to cause grievous harm to the 1st deceased.

This court infers from the fact of this case that the accused fatally assaulted the 1st deceased because he was unhappy that the 1st deceased had reported him to his in-laws on allegation that the accused had sold the cows that the in-laws had given to the 1st deceased for her upkeep. In the circumstance of this case, the 2nd deceased for her upkeep. In the circumstance of this case, the 2nd deceased's death was occasioned by the fact that he was sleeping next to his mother at the time the 1st deceased was attacked with a sharp object. The prosecution adduced evidence which was to the effect that on 12th April, 2004 the 1st deceased and the accused had attended a meeting at the 1st deceased's parents' home to discuss the dispute relating to the alleged sale of cows by the accused. It was on the same night that the 1st deceased was viciously attacked. All the prosecution witnesses, including the accused himself in his defence, alluded to the fact that the 1st deceased had no enemy who could have desired her death. The only person who had a grudge against the 1st deceased was the accused. I hold that the circumstantial evidence adduced by the prosecution witnesses points to no one other than the accused as the person who would have wished harm on the 1st deceased. I hold that it was the accused who assaulted the deceased persons with a sharp object causing them to sustain injuries which proved fatal. The fact that the murder weapon was not recovered does not in anyway weaken the prosecution's case. I hold that the alibi defence offered by the accused was just but a story created by the fertile imagination of a culpable person in a desperate bid to escape criminal liability.

Having evaluated the evidence adduced by the prosecution witnesses and the alibi defence of the accused, I am satisfied that the prosecution has discharged legal burden placed on it to establish the charge of murder against the accused to the required standard of proof beyond any reasonable doubt. I hold that the prosecution established that the accused attacked the deceased persons with a sharp object while they

were asleep. The absence of defensive wounds on the body of the 1st deceased, and the fact that none of the children of the 1st deceased heard any screams at night, was ample evidence of the stealthy and surreptitious nature of the attack. It was apparent that the accused, in attacking the deceased persons in the manner that he did, meant to cause grievous harm, if not fatal injury to the deceased persons. Their deaths was therefore clearly premeditated. I hold that the prosecution proved malice aforethought on the part of the accused.

In the premises therefore, I convict the accused of the tow counts of **murder** contract to **section 203** as read with **section 204** of the penal code. The accused is accordingly convicted.

DATED this 15th day of May, 1009 at **KERICHO**

L. KIMARU

JUDGE