



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Case 36 of 2006

-VS-

JOSEPH KINYANJUI MWIKAMBA (alias CIINJU)

JUDGMENT

The accused has been charged for the offence of murder, contrary to Sec. 203 as read with Sec. 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence as stated in the information are as follows:

“On the night of 29th/30th September, 2004, at Githunguri Location in Kiambu District within Central Province murdered JOSEPH KARIGU KARANJA.”

In his evidence, **PW1 Samwel Karanja Muthemba** introduced himself as the father to the deceased and businessman operating a retail shop. Further to the above, he also testified that on 30th of September, 2004, he went to Kiambu District Hospital where he found that his son was already dead. Earlier, on 29th of September 2004, at around 7 am Mbugua Kamau went and asked him whether he knew what had happened to his son. In response, PW1 replied in the negative and Kamau told him that he had seen his son lying on the road from their village to Kambaa. Apart from the above, Kamau also informed him that he had found his son bleeding and that he was unable to communicate with him. In response, PW1 proceeded to the scene while accompanied by Isaac Ingere Ndonyi. On arrival, PW1 found his son lying down while bleeding from the head and mouth. After putting him on a bicycle for about 10 metres the deceased requested for water. On the way the deceased complained that he had been assaulted by **Kinyanjui Mwikamba** and **Kanai Kinyanjui** who were all known to PW1 as they were all neighbours. Subsequently, PW1 took his son to a hotel where he bought him some milk. From there, PW1 took his son to Githunguri Dispensary while using a vehicle. On arrival, the doctor referred them to Kiambu District Hospital where the deceased was x-rayed and admitted. On the following day at around 7 am, the deceased repeated the names of the assailants and complained that they were the ones who had assaulted him. While the doctor was attending to the deceased, PW1 decided to go back to his home. At around 3pm, Monica Njoki who is a daughter-in-law to PW1 informed him that her husband had already died. In response, PW1 went and reported the matter at Githunguri Police Station. On 10th of October, 2004, PW1 went to the City Mortuary where he identified the body of his son before an autopsy was carried out. On the other hand, **PW2 Charles Mwangi Kimani**, testified that on 29th of September, 2004, at around 7.30 am while he was going to the local trading centre, he met a group of people that was starring at somebody who was bleeding from the face. PW2 was able to identify the person lying down as Karigu who hails from their village. PW2 also saw PW1 who was removing ants from the body of his son. While there, PW2 saw Karigu being placed on a bicycle and complaining that he had been assaulted by Siju and Kanai. PW2 informed the court that he knew Siju as a friend to the deceased. From there, they

took Karigu to Murathe Hotel so that his clothes could be changed. After two days, PW2 received a report that Karigu had died. While concluding his testimony, PW2 stated that the accused is also known as Siju and Kinyanjui. On his part, **PW3 Isaac Kimani Ndonye** introduced himself as a farmer in Githunguri and Kitale. He also testified that on 29th of September, 2004, at around 6.40 am he left his home and went to the shop of Muthemba whom he found outside on the verandah. Muthemba told him to go and fetch his bicycle since his son had slept at Village Inn. On going to the scene, they found the son of Muthemba lying by the side of the road. He identified the son as Stephen Karigu. While there, Muthemba started removing ants from the body of the son and later placed him on the bicycle with the assistance of Mwangi. It was the testimony of PW3 that he never heard Stephen Karigu saying anything. On reaching the local bus station, Muthemba told PW3 to go and fetch clothes for the deceased. On going back, Muthemba dressed-up the deceased and PW3 returned his bicycle to his home. Thereafter, he escorted Muthemba and the deceased to Githunguri Hospital. From there, PW3 reported the matter at Githunguri Police Station. While there, PW3 was informed that Stephen Karigu had been transferred to Kiambu District Hospital. On 10th of October, 2004, PW3 escorted Muthemba to the City Mortuary to enable him collect the body of his son for burial purposes. In his evidence, **PW4 Joshua Maina Ng'ang'a** recalled that in September, 2004, he used to be a watchman. Specifically, on 29th of September, 2004, he went on duty at around 7.30 pm when Stephen Karigu and Joseph Kinyanjui approached him. He also informed the court that he had known the two for about 4 – 5 years. Unfortunately, Kinyanjui abused him by called him a prostitute. From there, they told him that they were heading to Ever-Blazing Bar. By that time, Stephen Karigu had a small black leather bag. At around 11 – 11.30 pm, Kinyanjui went back to him while carrying a stick and holding a dog which had been tied to a chain. According to PW4, Kinyanjui complained that he had been robbed of an unspecified amount of money. After about 30 minutes, PW4 heard a whistle being blown. However, the watchman who blew the whistle went into hiding. Consequently, that watchman complained that he had been threatened by two people and that one of them was having a dog. On the following day, PW4 was informed that Stephen Karigu had been assaulted. However, the deceased died on the following day. In her medical evidence **PW5 Dr. Jane Simiyu Wasike** introduced herself as a pathologist working for the National Health Laboratories and based at the City Mortuary in Nairobi. She testified that on 5th of October, 2004, she performed a post-mortem on the body of Samuel Karanja Muthemba. PW5 informed the court that the body of the deceased was in fair nutritional status. She also stated that the deceased had bruises on the upper limb. She found that the lungs of the deceased were congested. The deceased's digestive system had suppurative ascetic fluid, fibrinous adhesion, mesentery illeum had perforation approximately 2cm x 1 cms. The other systems were not remarkable. PW5 formed the opinion that the cause of death was suppurative peritonitis due to blunt abdominal trauma. PW5 later filled and signed the post-mortem form that she produced as exhibit 1. **PW6 Dr. Zephania Kamau** introduced himself as a police surgeon based within Nairobi area. In his medical evidence, he testified that on 25th of July 2005, he examined the accused and found him to be 29years old and without any physical injuries. He also found him to be mentally fit to plead to the charges before the court. During the trial, he produced the P3 form that he had filled and signed as exhibit 2. On the other hand, **PW7 Monica Njoki Muthemba** introduced herself as the widow to the deceased. She also testified that on 28th September, 2004, at around 8 am the deceased came to Nairobi to collect his salary. On the same day, at around 11 pm, PW7 heard noise outside her house. On the following day, PW7 was informed by one John that he had seen his husband who had been beaten by thugs. That apart, John also informed her that her husband had been asking for water from school children. On rushing to the scene, PW7 found her husband bleeding from the head to the face. She also observed that terminates were all over the body of her husband. Subsequently, her husband complained that if he died then that would be because of Kinyanjui Mwikamba who had assaulted him. While at the scene, PW7 was advised to go and get some fresh clothes for her husband because what he was wearing was already blood soaked and also had some mud. On the way, PW7 met Kungu who explained that he had earlier seen the husband who had been beaten by some people. Kungu later admitted that he had taken the bag that the deceased had at that particular time. From there, PW7 went to the house of Kungu where the wife gave her the bag after she explained that she was going to use the same to carry fresh clothes to the husband so that he could be taken to the hospital. Inside the bag, PW7 found some beans, salt and blood-soaked clothes. Eventually, PW7 went to Kiambu District Hospital and informed the husband where she had got the bag. In response, the deceased complained that Kungu was one of the assailants. From there, PW7 and PW1 went to Githunguri Police Station where they reported

the matter. On 30th of September, 2004, PW7 went back to Kiambu District Hospital where she was informed that the husband had already passed away. She concluded her testimony by stating that she had known Kinyanjui Mwikamba who is now the accused for the last 16 years. On his part, PW8 PC Allan Murugu testified that on 30th of September, 2004, he reported on duty at Githunguri Police Station and at around 7 am found that the OCS had minuted him for an assault case relating to Joseph Karigu Karanja who had already been escorted to Kiambu District Hospital. On going there, PW8 found that the deceased had already died while undergoing treatment. PW8 further testified that the body was later removed to the City Mortuary while awaiting an autopsy. On 5th of October, 2004, the post-mortem was conducted. On 29th of July, 2005, PW8 escorted the accused to the police surgeon Nairobi area. According to PW8, the accused went underground for 8 months after the incident.

In his defence, **Joseph Kinyanjui Mwikamba**, the accused, testified that he is a mason by profession. Further to the above, he also testified that on 28th of September 2004, at around 5 pm he went to Kiambaa shopping centre where he entered Munjo Bar. While there, he ordered for alcohol and thereafter the deceased went to the bar and joined him. Consequently, the father to the deceased went there and called out his son. When the deceased went back, he ordered one more beer. Later PW4 joined them and the deceased bought him a soda. After finishing the same, PW4 went out. Thereafter, the accused collected his bag and left. At around 10.30 pm, the barmaid closed down the bar and entered an adjacent room where she used to stay. From there, the accused pushed the door to enable the bar maid to close from inside. According to the accused, he reached his house at around midnight. On the following day at around 9 am, the accused went back to the shopping centre where he was told that the deceased had been assaulted on the previous night. The accused also testified that the assailant had been arrested with his bag. On 30th of September, 2004, at around 11 pm, the accused met Mbugua in a bar while he was with the deceased's father. The accused reckoned that on 7th of October 2004, his wife came from Limuru and explained to him that there was a building contract there. On 9th of October, 2004, he accompanied her to Limuru where they started the work. After about one and half hours, the accused was told that the assailants of Karigu had been arrested. These were Kung'u and Kanai. The accused also recalled that on 19th of May, 2005, he was arrested and his tools were taken away. However, he was later released on 25th of August, 2005. When he went to collect his tools on 1st of September 2005 at Githunguri Police Station, the accused was arrested and placed in custody. He reckoned that he was later arraigned in court on 25th of April 2006.

After the summing-up was delivered, both the assessors returned a verdict of "Not Guilty" against the accused. They were unanimous that the accused and another had been arrested and released. Secondly, they took issue with the fact that the small leather bag was **not** produced in court.

From the evidence on record, it is explicit that none of the prosecution witnesses actually saw the accused assaulting the deceased on the material day. Obviously, the prosecution relied heavily on the dying declaration that was made by the deceased to his father (PW1) and widow (PW7) and a villager (PW2). Apart from the above evidence, there was nothing else that tied the accused to the offence before the court.

In the case of **KIHARA VS. REPUBLIC** (1986) KLR pg 473 the Court of Appeal stated inter alia:-

"Even though there is no rule that a dying declaration must be corroborated, a court needs to caution itself that in order to obtain a conviction upon a dying declaration, it must be satisfactorily corroborated and particular caution must be exercised as to when the attack took place, the identification of the assailant and the weapon used.

(b) Before a dying declaration is relied upon, it has to be shown that death is imminent and directly related to the incident."

In the case of **REPUBLIC VS. RAMAZANI BIN MIRANDU** (1934) 1 EACA pg 107, the court stated:

“The fact that the deceased told different persons that the appellant was the assailant is evidence of the consistency of his belief that such was the case, it is no guarantee of accuracy.”

Besides the above, in the book, **ARCHBOLD CRIMINAL PLEADING, EVIDENCE and PRACTICE** 27TH Ed. Section 2914 at pg 950 on corroboration states:

“Even where there is sufficient warning, but matter is suggested as being corroborative which are not, and there is, in fact, no corroboration, a conviction may be quashed an appeal.”

In this case, the three prosecution witnesses never indicated whether the deceased told them where the attack took place and the weapon that was used. That apart, there is nothing else to link the accused with the offence. In view of the sketchy and unsatisfactory evidence, I hereby find that the prosecution has failed to prove their case beyond any reasonable doubt. It is due to the above reasons that I hereby concur with the assessors that the accused is innocent. Under the circumstances, the defence of the accused seems reasonable and plausible. The upshot is that I hereby find that the accused is “Not Guilty” of the offence of murder, contrary to Sec. 203 as read with Sec. 204 of the Penal Code, Cap 63, Laws of Kenya. The accused should be released forthwith unless held lawfully. Those are the Orders of the Court.

MUGA APONDI

JUDGE

Judgment read, signed and delivered in open court in the presence of the accused;

TELEDefence Counsel

KABAKAState Counsel

Order:

Two assessors to be paid allowances.

MUGA APONDI

JUDGE

4TH AUGUST 2009