



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Criminal Case 11 of 2004

**REPUBLIC.....PLAINTIFF
VERSUS
BEN HADAD KIMANI.....ACCUSED
JUDGEMENT**

1. Ben Hadad Kimani is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on 29.8.2001 at Mtito Andei Township in Makueni District within Eastern Province with others not before the court, he murdered in count 1, Irene Ng'endo Kiama and in count II, her son, Stephen Mwaura Chege. He denied the offence and in evidence before this court, PW1, Gibson Munene was the one who identified the bodies of the deceased persons prior to the post-mortem examination being conducted.
2. It was the further evidence of PW1 that he was present in the deceased's house when he recovered a spent cartridge which he gave to the CID officers at Mtito Andei Police Station.
3. PW2, Jacob Muchina Kariuki, a watchman at Transport Bar and Lodging in Mtito Andei recalled that on 29.8.2001 at about 6pm he heard gun-shots coming from the deceased's house-cum-shop. On his way to make a report at the Police Station, he met four (4) people running away and who told him that there was shooting at "**Mama Sigara's**" shop. He went on and made his report and the police officers went to the scene in a motor-vehicle.
4. PW3, Jeremiah Kavita Munguti, a Government Analyst said that on 31.8.2001 received the following items;
 - a. blood sample of the accused
 - b. blood sample of Stephen Mwaura Chege
 - c. blood sample of Irene Ng'endo Kiama
 - d. Grey/black/green/white, brown pullover belonging to the accused.
5. He analysed the samples and pullover and concluded that the pullover belonging to the accused person was moderately stained with blood group A which is similar to the blood sample obtained from Stephen Mwaura Chege (deceased).
6. PW4, PC Kioko Mutunga took photographs of the deceased's house and their bodies after the shooting incident that left them dead.

7. PW5, Lydia Karimi was at the deceased's house at 7pm on 29.8.2001 when two men entered the house. One had a gun and pointed it at Stephen when Irene started screaming. PW5 hid under a table and heard two gun-shots. She hid for 20-30 minutes and when she emerged, she saw that both Stephen and Irene had been shot dead and nothing stolen from the house.
8. PW6, Cpl. Nicholas Kimanthi received the initial report from PW2 at Mtito Andei Police Station and together with PC Kimuyu and PC Githae, rushed to the scene and meet a group of people taking Irene to a nearby medical clinic. She had been shot in the rib and through the chest. He asked two (2) officers to preserve the scene and he combed the town for clues about the assailants but it was only at midnight that two suspicious looking men had been sighted at Wayside Service Canteen. Together with PC Githae and PC Wambua, PW6 went to the canteen and the two were pointed out. One of them appeared nervous and then started running away. The police officers pursued him and when he was arrested, a pistol was found on him together with five (5) rounds of ammunition. The person also had a receipt showing that he was travelling to Nairobi and his name was "**Paul**".
9. When the suspect was taken into custody it was established that his name was Ben Hadan Kimani, from Murang'a but living in Kawangware, Nairobi.
10. PW8, Johnstone Musyoki Mwongela, a Firearms Examiner produced a ballistics examination report prepared by one Ronald Mugo. His findings were that the three (3) cartridges found at the scene were all fired from the pistol recovered from the accused on the material night.
11. PW8, PC Gregory Wambua gave evidence similar to that of PW6 and I see no need to repeat it – but it is important to note that he said that as the suspect ran away he PW8, "**never lost sight of him.**"
12. In his defence the accused person said that on 29.8.2001 he was travelling to Mombasa and just before midnight, the bus he was travelling in stopped at Mtito Andei for passengers to take refreshments. That the accused with other passengers went into a canteen and then he was arrested for the present offence which he knew nothing about. He denied being found in possession of the pistol or ammunition. He however confirmed that he had been convicted of offences related to possession of the same and was at the conclusion of this trial, serving sentence in respect thereof.
13. The accused denied that his pull-over was taken for analysis nor was his blood sample taken either.
14. I have taken into account the submissions by both Mr. Mutuku for the accused and Mr. O'mirera for the state. In my evaluation and analysis of the evidence, I should start by addressing an issue raised in submissions; that the accused person was arraigned in court outside the 14 day period envisaged by section 72(3) (b) of the Constitution. The issue may well be valid but I cannot address it for reasons that the State was not given a fair opportunity to explain the delay. The issue was raised at the end of the trial and to be fair to all parties, the State has a right under the quoted section of the Constitution to explain the delay, if at all. Without that explanation and its reasonability or otherwise, I do not think it fair to determine the issue. In any event the accused person still has a remedy under section 72 (6) of the Constitution and can pursue it at any moment.
15. On the merits of the case, there is no doubt that Irene Ng'endo Kiama and Stephen Mwaura Chege were both shot inside their house in Mtito Andei on the night of 29.8.2001. They succumbed to their injuries on the same night. It is also not in doubt that from the evidence of PW8, that the cartridges found inside the house came from the pistol produced in evidence before this court. There is also no emphatic eye witness to the shooting on the identity of the shooters because PW5 did not identify the man who allegedly shot the deceased persons. In the end, all the evidence is purely circumstantial and as I understand the law in that regard, circumstantial evidence is as good as any other if all the circumstances put together would lead one to the irresistible conclusion that it is the accused person and no other who committed the offence – see **Republic vs Kipkering Arap Koske & Another [1949] 16 E.A.C.A 135** and **Musoke vs Republic [1958] E.A. 715**. In this case the circumstances are that when the accused person was arrested, he had a pistol and ammunition on him and when the same was analysed, alongside

the empty cartridges recovered at the scene, the same pistol was found to have discharged the bullets that killed the deceased persons. Secondly, that his conduct of running away when he was accosted was a factor indicative of his guilt and thirdly, that when his pullover was examined, it was moderately stained with blood group A which was the same as that of Stephen Mwaura Chege. Are these circumstances so compelling as to the accused's guilt?

16. My mind is clear that from the circumstances above, more likely than not the accused person was the assailant in this case. I say so because he has already been convicted by the subordinate court of the offences of possession of the firearm and the ammunition. In any event, the evidence of PW6 and PW8 was consistent on the circumstances of the accused's arrest. If he was innocent, why did he run away when accosted and why did it take PW6 to shoot in the air for him to stop? Why would he be found with a pistol and ammunition which when analysed is found to have a connection with the empty cartridges in the deceased's house, if he indeed had nothing to do with the shooting?

17. His action of running away is akin to that of an offender going into hiding soon after the offence and in Gathangu vs Republic [1984] KLR 652, such a conduct amounts to circumstantial evidence that should be taken into account. Further, once the accused's pull-over is found to have blood of the same group as Stephen Mwaura Chege then together with the evidence of PW5, it is indeed the accused who shot Stephen. This is because according to PW5, Stephen actually accosted the shooter and then he was shot at point blank range as opposed to Irene who was shot as she ran away. The chances of blood splattering is not remote when the shooting is at close range.

18. On the whole therefore, I am satisfied that the Republic has proved its case beyond reasonable doubt and I convict the accused person accordingly on both counts of murder. That being the case, I will sentence him to death on count 1 and suspend execution in respect of count II pending any appeal proceedings and/or execution of count I.

19. Right of appeal explained.

20. Orders accordingly.

Dated and delivered at Machakos this **29th** day of **September 2008**.

Isaac Lenaola

Judge

In the presence of: Mr. Wang'ondy for Appellant

Mr. Mutuku for Accused

Isaac Lenaola

Judge