



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 91 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

ANNE MWENDE NDUNGU.....1<sup>ST</sup> ACCUSED

LUCAS AMINO MADIERO.....2<sup>ND</sup> ACCUSED

JUDGMENT

The accused persons, Anne Mwende Ndungu (*hereinafter referred to as the 1<sup>st</sup> accused*) and Lucas Amimo Madiero (*hereinafter referred to as the 2<sup>nd</sup> accused*) were charged with **murder contrary to Section 203 as read with Section 204 of the Penal Code**. The particulars of the charge were that on the nights of the 25<sup>th</sup> and the 26<sup>th</sup> of August 2004 at Kasarani Estate, Elburgon, the accused persons jointly with others not before court murdered David Igunze (*hereinafter referred to as the deceased*). The accused persons pleaded not guilty to the charge. The prosecution called five witnesses in support of the charge. After the close of the prosecution's case, this court put the accused persons on their defence. They each gave sworn testimony in their defence and denied that they were involved in the death of the deceased.

The prosecution's case against the accused persons based on their reconstruction of the events leading up to the death of the deceased is as follows: The deceased was a friend of one Mudavadi who was however not called to testify. According to PW2 Samuel Amukono, the deceased and his friend Mudavadi used to visit the 1<sup>st</sup> accused at her house within Kasarani Estate Elburgon. PW2 recalled that on the 24<sup>th</sup> of August 2004 at about 8.00 a.m. as he was seated outside his house, within the same plot as the house where the 1<sup>st</sup> accused was residing, he saw the deceased and his friend go to the house of the 1<sup>st</sup> accused. After a while, Mudavadi left the deceased at the house of the 1<sup>st</sup> accused. The deceased and the 1<sup>st</sup> accused stayed in the house up to 11.00 a.m. when PW2 saw them leave the house.

On the following day *i.e.* the 25<sup>th</sup> of August 2004, PW2 was again seated outside his house at 9.00 a.m. He saw the deceased and his friend Mudavadi visit the 1<sup>st</sup> accused. The 1<sup>st</sup> accused was at her house with her friends called Maggie and Muthoni. PW2 testified that Mudavadi did not stay for long but left after a short while. The deceased remained in the 1<sup>st</sup> accused's house together with the 1<sup>st</sup> accused's friends Maggie and Muthoni up to late evening. PW2 saw them leave the compound. The deceased informed PW2 that he was going to watch a video with the 1<sup>st</sup> accused. Maggie and Muthoni also left the house. PW2 testified that the deceased came back with the 1<sup>st</sup> accused at about 9.00 p.m. He did not see them

enter the house of the 1<sup>st</sup> accused, although he testified that he heard them talking.

PW2 went to sleep and when he woke up the following day *i.e.* on the 26<sup>th</sup> of August 2004, the 1<sup>st</sup> accused came to his house and asked him if the deceased had left him the keys of her house. It was about 10.00 a.m. PW2 answered in the negative. PW2 heard the 1<sup>st</sup> accused ask the 2<sup>nd</sup> accused if he had seen the keys to her house. He saw the 2<sup>nd</sup> accused give the keys of the house to the 1<sup>st</sup> accused. When the 1<sup>st</sup> accused opened the door of her house, she screamed saying that there was someone who was lying dead inside her house. PW2 went to the door of the house of the 1<sup>st</sup> accused and peeped inside. He saw a man lying dead in the house. The neighbours who were also present came and saw the deceased inside the house. They then advised the 1<sup>st</sup> accused to report the incident to the police. The 1<sup>st</sup> accused reported the incident to the police.

PW3 Chief Inspector of Police Dalmas Ongere and PW5 Cpl. Richard Rotich testified that when the 1<sup>st</sup> accused reported the death of the deceased to the Elburgon Police Station, the two of them accompanied the 1<sup>st</sup> accused to her house. They saw the body of the deceased lying in a pool of blood inside the house. PW3 formed the opinion that the deceased had been killed inside the house. PW3 and PW5 testified that they interrogated the 1<sup>st</sup> accused who told them that she had left the keys of her house with PW2. When they interviewed PW2, he denied that the 1<sup>st</sup> accused had left the said keys with him. The police officers were able to establish that the keys to the house of the 1<sup>st</sup> accused where the deceased was found dead, was in possession of the 2<sup>nd</sup> accused who gave it to the 1<sup>st</sup> accused when she inquired about it. The police officers were not satisfied with the explanation given by the 1<sup>st</sup> accused that she had slept at her uncle's house on the night preceding the day when the body of the deceased was discovered. They were further not satisfied with the explanation given by the 2<sup>nd</sup> accused of the circumstances that the keys to the house of the 1<sup>st</sup> accused was found in his possession. They did not believe his explanation that he had found the said keys outside her house.

PW3 and PW5 gave conflicting evidence as to the circumstances under which the 2<sup>nd</sup> accused was arrested. Whereas PW3 testified that the 2<sup>nd</sup> accused was fetched from a crowd of people who had gathered outside the plot where the house of the 1<sup>st</sup> accused was located, PW5 testified that the 2<sup>nd</sup> accused was fetched by the police motor vehicle some distance from the said house of the 1<sup>st</sup> accused. PW3 and PW5 testified that they saw blood stains on the T-shirt that the 2<sup>nd</sup> accused was wearing. They both testified that the 2<sup>nd</sup> accused did not give a reasonable explanation as to how the said T-shirt came to have blood stains. The T-shirt was taken to the Government Chemist for analysis. However by the time of the trial, the government chemist had not returned the T-shirt. The said T-shirt was not therefore produced in evidence by the prosecution.

PW5, the investigating officer of the case, testified that the police were not certain who had killed the deceased but were of the opinion that the accused persons were somehow involved with his death. PW1 Dr. Amwayi Samuel Anyangu testified that the deceased had sustained deep cut wounds on his head reaching into the skull. He had also deep cut wounds on his neck that resulted in the dissection of the trachea. He formed the opinion that the cause of death of the deceased was cardio pulmonary arrest secondary to massive penetrating head injury secondary to multiple cut wounds of the head and neck. PW4 Joash Eriko Igunza, the father of the deceased, identified the body of the deceased on the 3<sup>rd</sup> of September 2004 at the Elburgon Hospital Mortuary before post-mortem was conducted by PW1.

After the close of the prosecution case, the accused persons were put on their defence. They opted to give sworn evidence. The 1<sup>st</sup> accused denied that she had killed the deceased. She explained that the deceased was known to her. On the 25<sup>th</sup> of August 2004 she had slept at her uncle's. She testified that she locked her house and left the keys with PW2 with instructions that PW2 was to give the keys either to Maggie or Beth. On the following day when she returned to her house, she found the door of her house locked from the outside. She went to the house of PW2 and asked him to give her the keys. PW2 told the 1<sup>st</sup> accused that he did not have the keys. The 1<sup>st</sup> accused then asked the 2<sup>nd</sup> accused, who was washing his clothes

outside his house, if he had seen her keys. The 1<sup>st</sup> accused testified that the 2<sup>nd</sup> accused informed him that he had found some keys outside her house. He handed over the keys to the 1<sup>st</sup> accused and asked her to confirm if they were hers. The 1<sup>st</sup> accused confirmed that indeed the keys were hers. She went to her house, opened the door, and saw the body of the deceased covered with a blanket. She screamed and alerted the neighbours who advised her to report the incident to the police. She denied that she had anything to do with the death of the deceased.

On his part, the 2<sup>nd</sup> accused testified that he found the keys of the house of the 1<sup>st</sup> accused outside her house near an open drain. He kept the keys because he did not know whom they belonged to. When the 1<sup>st</sup> accused asked for them, he gave it to her. He witnessed the 1<sup>st</sup> accused open the door to her house and heard her scream that there was someone who was dead in the house. The 2<sup>nd</sup> accused peeped into the house of the 1<sup>st</sup> accused and saw the body of the deceased. He then advised the 1<sup>st</sup> accused to report the incident to the police. He denied the evidence adduced by PW3 that he was wearing a T-shirt which had blood stains. He denied that he was in any way involved with the death of the deceased.

The issue for determination by this court is whether the prosecution has established that it was the accused persons who killed the deceased with malice aforethought. The onus of proof in criminal cases is always on the prosecution. The prosecution has to prove the guilt of the accused persons based on the evidence adduced in court. In the instant case, the prosecution has relied on circumstantial evidence in its bid to establish that it is the accused persons who killed the deceased with malice aforethought. There was no direct evidence which was adduced by the prosecution to establish the guilt of the accused persons. It is often said that circumstantial evidence is the best evidence because it excludes any other person other than the accused persons as the persons who could have committed the offence. In Mwangi –vs- Republic [1983] KLR 522 the Court of Appeal held at page 531 that:

***“An offence like murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed. It is well established that in a case depending exclusively upon circumstantial evidence the court must, before deciding upon a conviction, find that inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt; Peter Kubaita Paul –vs- Republic Cr Appeal No. 71 of 1979 (unreported). In Musoke –vs- R [1958] EA 715 the predecessor of this court said:***

***“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 the instant case, it is the prosecution’s case that since the deceased was found in the house of the 1<sup>st</sup> accused, then she must be aware of the circumstances that led to his death. As regard the 2<sup>nd</sup> accused, it is the prosecution’s case that since he was found in possession of the keys to the house of the 1<sup>st</sup> accused, then he must be aware of the person who killed the deceased and locked his body inside the 1<sup>st</sup> accused’s house. Another piece of evidence that was adduced against the 2<sup>nd</sup> accused was the blood stained T-shirt that he was found wearing. In answer to the prosecution’s case, the 1<sup>st</sup> accused testified that she slept at her uncle’s on the night that the deceased must have met his death. She also testified that she had left the keys to her house with PW2 so that he could give it to her friends if they required it. In the case of the 2<sup>nd</sup> accused, he testified that he picked the keys to the 1<sup>st</sup> accused’s house in an open drain outside her house. He denied that he had anything to do with the death of the deceased.

Does this evidence establish the guilt of the accused persons? Does the circumstantial evidence adduced by the prosecution establish beyond any reasonable doubt that it is the accused persons who killed the deceased with malice aforethought? It should be borne in mind that PW5 testified that there were many loose ends in this case that could have meant that someone else could have killed the deceased and locked him inside the house of the 1<sup>st</sup> accused. The evidence of PW2 in this regard is crucial. PW2 is physically disabled and therefore during the entire period did not move out of the compound. He narrated what went

on in the house of the 1<sup>st</sup> accused. The 1<sup>st</sup> accused however discounted the evidence of PW2 by stating that sometimes PW2 used to get drunk.

I have carefully evaluated the evidence that was adduced by the prosecution witnesses and the evidence that the accused persons gave in their defence. It is clear that the only reason why the 1<sup>st</sup> accused was charged was because the body of the deceased was found in her house. In her defence, she testified that on the night before the body of the deceased was found, she slept at the house of her uncle. This was an alibi defence. The police did not interview the uncle of the 1<sup>st</sup> accused to establish if she had indeed slept at her uncle's house. Her alibi defence therefore was unchallenged by the prosecution. Further, it would be inconceivable that if the 1<sup>st</sup> accused was actually involved in the death of the deceased, she could have come back and confidently entered her house. It is clear from the evidence adduced by the prosecution witnesses, that the 1<sup>st</sup> accused always insisted that she had left the keys of her house with PW2 who was physically disabled and was therefore always present at the compound. The evidence adduced by the prosecution witnesses therefore did not prove to the required standard of proof beyond reasonable doubt that the 1<sup>st</sup> accused was involved in the death of the deceased. Her alibi defence as to her whereabouts on the material night that the deceased died, raises reasonable doubt that she was in her house when the deceased was killed.

As regard the 2<sup>nd</sup> accused, the police connected him with the death of the deceased because he was found in possession of the keys to the house of the 1<sup>st</sup> accused. He explained that he had picked up the keys in a drain outside the house of the 1<sup>st</sup> accused. He kept the keys, and when the 1<sup>st</sup> accused asked for them, he handed them to the 1<sup>st</sup> accused. The 2<sup>nd</sup> accused did not make any attempt to run away from the scene when the report of the death of the deceased was made to the police. The prosecution tenuously tried to connect the drop of blood that was found on the T-shirt of the 2<sup>nd</sup> accused with the death of the deceased. However the evidence of the said blood stain was not adduced in evidence because the report by the Government Chemist was not produced in evidence. In my opinion other than the evidence of the recovery of the keys, there is no other evidence that connects the 2<sup>nd</sup> accused with the death of the deceased.

In the circumstances therefore, I find that the prosecution has failed to prove its case on the charge of murder against the accused persons to the required standard of proof beyond reasonable doubt. The two assessors who assisted this court during the hearing of the murder trial entered a verdict of guilty after putting undue emphasis on the evidence of the recovery of the keys to the house of the 1<sup>st</sup> accused where the body of the deceased was found. However for the reasons stated above, I disagree with the assessors.

The accused persons are therefore acquitted of the charge of murder. They are ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

**DATED at NAKURU this 23<sup>rd</sup> day of June 2006.**

**L. KIMARU**

**JUDGE**