



REPUBLIC OF KENYA

HIGH COURT AT MERU

CRIMINAL APPEAL 59 OF 2003

REPUBLIC THROUGH THE ATTORNEY GENERAL.....APPLICANT

VERSUS

HENRY KOBIA ACCUSED

J U D G E M E N T

1. Henry Kobia was charged with 2 counts of murder contrary to s.203 as read with s.204 of the Penal Code. The case for the Republic is that on 19.3.2003 at Thuuru Sub-Location in Meru North District, he murdered Peter Kibwi and Jacinta Karimi Kibwi.
2. The Republic called P.W.1 Charity Nchoro Kibwi, wife of Peter Kibwi (deceased) and mother of Jacinta Karimi Kibwi (deceased) It was her evidence that on the material day she had gone to attend a meeting at Thuuri Primary School and on returning home at about 5.30 p.m., she found her daughter Jacinta badly injured and being carried to hospital by one Murungi and one Isaiah Nkunja. She proceeded to her house and found her husband Peter Kibwi also injured seriously on the head and together with one Kabulia, they took him to Maua Hospital where he was pronounced dead. Later that night, her daughter Jacinta also died.
3. P.W.1 said that Nkunja told her that both Peter Kibwi and Jacinta Karimi Kibwi were killed by Henry Kobia, the accused person whom she knew as one of their neighbours.
4. P.W.2, Isaiah Nkunja M'Munugu was at his home at about 5.00 p.m. when he heard screams from the direction of Henry Kobia's home and when he dashed there, he found Kobia's wife who was shouting and screaming. P.W.2 asked Kobia's wife what the matter was and she said that Kobia had cut Kibwi and his daughter and pointed to where Kobia was. P.W.2 saw that Kobia had a panga with blood-stains on it and which had a wooden handle. P.W.2 said that he and Kobia were classmates in school and knew each other well and that Kobia had prior to the material date quarreled with Kibwi.
5. P.W. 3 Zakayo Kabulia was declared a hostile witness by the State but he also said that like P.W.2 he heard Kobia's wife shouting that Kobia had killed Kibwi and Karimi.
6. P.W.4 Peter Muriungi Karago said that he saw Kobia holding a panga and running away from Kibwi's home and that he also saw Kobia's wife running away and shouting that Kobia had cut Kibwi and that Kibwi had died.
7. P.W.5 P.C. Bernard Kuguri received the report of the death of Kibwi from P.W.1 Charity Kibwi and that he visited Maua Hospital and found that Kibwi had indeed died and when he and one Cpl. Wamalwa

went to arrest the accused based on P.W.1's report, they found that he had disappeared. P.W.5 was unable to recover any weapon or trace a reliable eye witness to the attack on Kibwi and his daughter. P.W.5 further testified that Henry Kobia was ultimately arrested after one(1) month, 10 km from his home.

8. P.W.6 Dr. Wachira Maina produced the post-mortem reports (P.Exh.1 and P. Exh .2) for both Kibwi and Jacinta and it was his evidence that they died of bleeding due to penetrating injuries to their heads.

9. The Accused chose not to tender evidence in his defence and in submissions by both the learned State Counsel and the Advocate for the accused, it is clear that all the evidence tendered was circumstantial. There was no eye witness to the alleged act of murder and no weapon was recovered. The question that this court must grapple with is whether all circumstances point to the irrefutable conclusion that only the accused and no other person committed the offence. As was held in *Kariuki Karanja vs R* [1986] KLR 190.

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and...” and it is the law that the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts which justify the drawing of that inference to the exclusion of any other reasonable hypothesis of innocence is always on the prosecution and never shifts. (*Rex vs Kipkering Arap Koske* 16 EACA 135).

10. In the *Karanja Case* although there was no eye witness to the killing of the deceased, the Appellant was found to have been the person who shot the deceased inside a police station report office using a revolver that he had and the Court of Appeal held that there was sufficient circumstantial evidence in terms of the principles laid down in *Kipkering Arap Koske's* case to prove the guilt of the Appellant beyond reasonable doubt.

11. In the instant case, we have the evidence of P.W.2 Isaiiah Nkunja who actually saw the accused with a blood stained panga. P.W.2 heard the accused's wife shouting that it was the accused who had cut Kibwi and Jacinta Karimi. Although declared a hostile witness and cross-examined, P.W.3 Zakayo Kabulia had no hesitation in saying that he too heard the accused's wife saying that he too heard the accused's wife saying that Kobia had cut Kibwi and Karimi. For obvious reasons known to law, the accused's wife was not called to testify but when one takes the evidence of P.W.2, P.W.3 and P.W.4 who all heard the same words, then that in my view was corroboration enough. Like P.W.2, P.W.4 also saw the accused holding a panga and running away from Kibwi's home.

12. There is the further evidence of P.W.1 that on arriving at her home and finding her daughter, Jacinta Karimi being carried by P.W.2 and another, one Muriungi. She was informed by those persons that Jacinta had been cut by Kobia as was her husband, Kibwi. P.W.1 when making her report to P.W.5 clearly named the accused as the person who attacked her husband and daughter. The injuries described by all these witnesses were commensurate with those of P.W.6 Dr. Wachira Maina in the post mortem Reports that he produced. I quite agree that the evidence of the panga which was blood-stained and held by the accused before he disappeared into a miraa plantation is quite consistent with the sharp object injuries finally found to have been the cause of the deaths of Peter Kibwi and Jacinta Karimi. Failure to produce that weapon cannot be fatal to the prosecution case because it was the evidence of PW 5 that he was unable to arrest the accused on the material day because he disappeared and was found a month after the incident, a distance from his home. That period was sufficient for him to do away with the weapon, which he was last seen carrying into a miraa plantation by PW 2 and PW. 3.

13. All these matters would clearly show that it was the accused and no other person who committed the twin murders. I am alive, as I said, to the fact that all the evidence is circumstantial but as was said by Okubasu J. (as he then was) in *Kihungu vs R*. [1984] KLR 648, circumstantial evidence should not always be impugned merely because it is circumstantial. In the case before me, the irresistible conclusion from all the circumstances I have set out would lead to the clear conclusion that the case against the accused has been proved beyond reasonable doubt. I cannot fathom any other hypothesis than this; it is only Henry Kobia and not any other person in the whole world who committed the murders under

investigation.

14. Having so held, I have no choice than to convict the accused of the 2 counts of the murder of Peter Kibwi and Jacinta Karimi Kibwi as per the charge sheet.

15. This being my conclusion, then there is no other sentence known to our law in such circumstances; the accused is accordingly sentenced to death as the only known sentence upon such a conviction.

16. Right of Appeal explained.

17. Orders accordingly.

Read, dated and signed in open court this 2nd day of August 2006 at Meru.

ISAAC LENAOLA

JUDGE

In the Presence of

Advocate for the Accused

Mr. Muteti State Counsel for the State

ISAAC LENAOLA

JUDGE