



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Case 69 of 2003

REPUBLIC..... PROSECUTOR

VERSUS

DANIEL KANDUTHU WANJOHI ACCUSED

J U D G M E N T

Daniel Kanduthu Wanjohi (hereinafter referred to as the Accused) is arraigned before this court charged with of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 29th June 2003 at Kiawara village in Nyeri District within Central Province he murdered Abraham Ndirangu Wangechi (hereinafter referred to as the deceased). This being a criminal case, the burden is entirely upon the prosecution to prove beyond reasonable doubt that the Accused did commit the offence. If there is any doubt the benefit must go to the Accused who must then be acquitted.

A total of 15 witnesses testified on behalf of the prosecution. Briefly their evidence was as follows: The accused is married to Mary Wahito Kamenju (P.W.4) who is a sister to the deceased. At the material time the Accused and P.W.4 were experiencing difficulties in their marriage as a result of which P.W.4 left the matrimonial home leaving some of their children behind. The Accused reported the matter to the children's Department following which all the 10 children of the marriage went to live with P.W.4.

On 29th June 2003 at about 1.00 p.m. the Accused went to the home of his mother in law Anna Wangechi Njauini (P.W.2) at Kiawara village in Mweiga Location of Nyeri District. The Accused's daughter Irene Wanjiru Wahito (P.W.7) who was then staying with her grandmother saw her father coming and she ran away. On arriving at the home the Accused sat near a tree and asked for P.W.7. P.W.2 sent someone to look for her but P.W.7 could not be found. The Accused went and stood leaning at the gate.

While the Accused was still at the gate, P.W.4 arrived at the homestead accompanied by her daughter Juliet Nyambura and baby Wairimu. Juliet Nyambura who was then a student at Gatarakwa, had been sent away from school and P.W.4 therefore decided to go and spend the night at her mother's home which was near the school so that she could take the child back to school the next day.

P.W.4 passed the Accused at the gate. The two did not talk but the accused talked to his daughter Juliet Nyambura. The Accused then went to the door of P.W.2's house and asked P.W.4 to escort him as he wanted to discuss something with her. P.W.4 however refused insisting that whatever it was Accused wished to discuss should be said in her mother's presence. The Accused persisted but P.W.4 stood her ground. Finally at about 4.00 p.m. the accused left. After a while, P.W.2, P.W.4, P.W.7 and P.W.9 went

to the river.

In the meantime the Accused's 8 year old grandson Ibrahim Njawine Wangechi (P.W.8) was playing with other children when he saw the Accused call the deceased and ask him where the people at home had gone. The deceased did not however respond. The Accused produced a small axe with which he hit the deceased on the legs. The deceased fell down after which the Accused cut him with a panga. The Accused then chased away P.W.8 and the other children.

James Kariuki Wandia (P.W.15) whose house neighbours that of P.W.2 heard noises and on going out met P.W.8. P.W.15 proceeded to the home of P.W.2 where he found the deceased lying down groaning. The deceased died shortly thereafter, P.W.8 informed P.W.15 and other people who had arrived at the home that it was the Accused who had cut the deceased.

P.W.2, P.W.4, P.W.7 and P.W.9 came from the river shortly thereafter. They found a crowd gathered around their home and the deceased lying dead near P.W.2's house with deep cuts on his body. P.W.2 proceeded to Mweiga Police Station where she reported the matter to Sgt. Abdi Kheri (P.W.11) who together with Chief Inspector Dickson Muriuki (P.W.13) the officer then in charge of the station and P.C. Mohamed, visited the scene and saw the body of the deceased. They contacted the scenes of crime personnel who came and took photographs. The body of the deceased was thereafter removed from the scene.

In the meantime at about 6.54 p.m. the Accused person went to Mweiga Police Station where he found P.C. Sam Musyimi (P.W.10) and P.C. Mumbi to whom he reported the murder of the deceased. As a result of what the Accused told the officers, the Accused was arrested and put in custody.

When P.W.13 came back from visiting the scene, he found the Accused at the police station. He interrogated the Accused who then led P.W.13 and P.C. Haro to Kiawara village to the scene of the murder. The Accused pointed to a flowerbed outside the house where P.W.13 recovered a bloodstained panga.

On the 8th July 2003 Dr. William Kibe (P.W.3) who was then attached to Nyeri Provincial General Hospital performed a post mortem examination on the body of the deceased. He noticed that the deceased had a deep cut to the neck which had severed the trachea and blood vessels leading to the brain. He also had an open skull fracture at the back of the head and the left mandible. He formed the opinion that the cause of death was exanguination and cardio respiratory failure following assault.

On 17th July 2003 Cpl. Nicasius Nyaga (P.W.12) prepared an exhibit memo, in respect of the panga, a bloodstained 'T' shirt recovered from the deceased and a blood sample said to be that of the deceased which were forwarded to Stephen Matinde Joel Waibe (P.W.14) a government analyst who examined the exhibits and formed the opinion that the blood sample was of group 'A' and that both the 'T' Shirt and the panga were stained with human blood of group 'A'. P.W.14 therefore formed the opinion that the bloodstains could have come from the deceased.

In his defence the Accused gave an unsworn statement and called no witness. He explained that he was arrested on 29th June 2003 and charged with murder. He denied having committed the offence. He explained that he was married to P.W.4 until the year 2002 when she deserted the matrimonial home. He referred the matter to the children's welfare officer and it was agreed that P.W.4 takes all the children.

On the material day the Accused went to the home of P.W.2 as his daughter Nyambura had sent a message to him requesting him to meet her there. He tried to talk to P.W.2 & P.W.4 but there was some exchange of words and Accused decided to leave. He went to his brother's home where he stayed until 4.30 p.m. While he was on his way back he noticed a crowd near P.W.2's gate. When he reached the gate he was surprised to see the deceased lying down in a pool of blood. He went to Mweiga Police Station where on making the report he was locked in. He denied knowing anything about the panga or the death of the deceased.

From the evidence that has been adduced, it is apparent that the relationship between the Accused and the deceased's family was strained because of the Accused's estrangement with his wife. It is also not disputed that the Accused did on the material day visit the home of P.W.2 where he unsuccessfully tried to talk to P.W.4 and left at about 4.00 p.m. It is evident that the deceased was attacked and seriously injured at the home of P.W.2 about an hour later. The question is who attacked and fatally injured the deceased?

At the material time P.W.2, P.W.4, P.W.7 and P.W.9 had all gone to the river. The only eye witnesses to what happened to the deceased was the Accused's grandchild Ibrahim Njawine Wangechi (P.W.8). Although this witness testified that he saw the Accused produce a small axe with which he hit the deceased on the legs and that when the deceased fell down, the Accused cut him with a panga, the evidence of this witness being the unsworn evidence of a minor cannot be acted upon unless corroborated by other material evidence implicating the Accused person with the commission of the offence.

There is the evidence of James Kariuki Wandia (P.W.15) who arrived at the scene shortly after the assault on the deceased. According to P.W.15 he met P.W.8 shortly after hearing a commotion outside. P.W.8 asked him to go and see whether his uncle had been killed and it was then that the witness proceeded to the home of P.W.2 where he found the deceased fatally injured. P.W.8 followed P.W.15 and informed P.W.15 and other persons who were present that it was the Accused who had cut the deceased. This piece of evidence though not necessarily corroborating the evidence of P.W.8 would have provided consistency to the evidence of P.W.8. However P.W.15 did not mention P.W.8 in his statement to the police. One wonders how P.W.15 could have forgotten such an important detail if indeed P.W.8 did inform P.W.15 that it was the Accused who had cut the deceased. There is also the evidence of recovery of the blood stained panga. This could have provided material corroboration of P.W.8's evidence. However there are two main problems that arise.

First section 25A of the Evidence Act as amended by Act No. 5 of 2003 states as follows:-

“25A A confession or any admission of a fact tending to the proof of guilt made by an Accused person is not admissible and shall not be proved as against such person unless it is made in court.”

A confession is defined in section 25 of the Evidence Act as:

“A confession comprises of words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonable be drawn that the person making has committed an offence.”

In this case the Accused was alleged to have been interrogated by P.W.13 after which he led P.W.13 and P.C. Haro to the scene of the murder to a flowerbed outside the house where a blood stained panga was recovered. That in effect is conduct which taken in conjunction with other facts may reasonably lead to the conclusion that the Accused person committed an offence. It falls squarely within the definition provided in section 25 of the Evidence Act. Now section 25A of the Evidence Act provides that such a confession is only admissible in evidence if it is made in court! That obviously is an absurdity. As was observed by my brother Ouko J in High Criminal Case No. 4 of 2006 (Malindi) Republic v/s Maalim Komora Godana & Another (2006) e KLR.

“Only a judicial as opposed to extra judicial confessions can be received by court. Judicial confessions are those which are made in court in the due course of judicial proceedings, where a suspect makes unequivocal plea of guilty to a charge under the protecting caution and oversight of the judge or magistrate.”

Moreover, in this case the police were still in the process of investigating the crime which had just been committed and the conduct of the Accused was therefore an extra judicial confession. Again I would echo my brother Ouko J in the above cited case that:

“It is inconceivable for judges or magistrates to be involved in receiving extra – judicial confessions otherwise than in proceedings before them. The court cannot abandon its constitutional mandate

of an independent and impartial arbiter to descend in an arena where that independence and impartiality may be blurred. To ask magistrates to record confessions of suspects in matters yet to be taken to court is to ask them to be part of the police investigation team..”

Notwithstanding the practical difficulties in the application of section 25A of the Evidence Act this court cannot use the evidence of the recovery of the bloodstained panga as against the Accused person as the same was not obtained in accordance with section 25A of the Evidence Act. This interpretation is reinforced by the repeal of section 31 of the Evidence Act by Act No. 5/03. That section 31 of the Evidence Act previously provided:-

“Notwithstanding the provisions of section 26, 28 and 29, when any fact is deposed to as discovered in consequences of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

Under the above section the evidence leading to the recovery of the panga would have been admissible in evidence. The repeal of section 31 however now means that such evidence leading to recovery is not excluded from the general provisions relating to the admissibility of confessions.

In my considered view, the amendments introduced by the statutes law miscellaneous amendment Act No. 5 of 2003 to the Evidence Act may have been well intentioned however they have resulted in an awkward and embarrassing situation in that the court is forced to ignore very material evidence tending to establish the guilt of the Accused thus dealing a death blow to an otherwise good case. At the same time it is evident that the amendments have become an impediment to the proper administration of justice as it is evident that courts cannot participate in the taking of extra judicial confessions. This is providing a loophole through which many good cases can be lost. The legislature would therefore be well advised to reconsider these provisions of the law.

Secondly even assuming that the evidence relating to the recovery of the panga was admissible there was some glaring inconsistency regarding the recovery of the panga. P.w.2 said absolutely nothing about the recovery of the panga even though the same was said to have been recovered from her home. P.W.4,

P.W.7 and P.W.9 all testified that the Accused person went back to the home of P.W.2 in the company of police and showed the police where the panga was. The strange thing however is that neither P.W.4, nor P.W.7 nor P.W.9 talked about the recovery of the panga in their statement to the police. They all claimed to have forgotten to tell the police about the panga in their statement. The question is how could all the witnesses have forgotten such a crucial piece of evidence so soon after the event?

Further although the government analyst Stephen Matinde Joel Waebe (P.W.14) who examined the panga testified that it was heavily stained with human blood of group 'A' there was a doubt as to whether the blood sample examined by P.W.14 was actually that of the deceased as Cpl. Nicasius Nyagah who forwarded the blood sample to P.W.14 claimed that he received the blood sample from Dr. Kibe (P.w.3) who took the sample from the body of the deceased and yet Dr. Kibe specifically denied having taken any blood sample from the body of the deceased.

In the light of the above I find that there is no proper admissible evidence established which corroborates the evidence of the minor (P.W.8) that the Accused person did commit the offence.

Moreover although the Accused person had a disagreement with his wife (P.W.4) there was no evidence that he had any reasons to attack the deceased who was just a younger brother to his wife.

With due respect, I disagree with the unanimous opinion of the Assessors that the Accused person is guilty of manslaughter as the evidence adduced is not sufficient to prove beyond reasonable doubt that the Accused person did commit any act or omission that caused the death of the deceased.

The upshot of the above is that I find the Accused person not guilty and acquit him of the charge of murder. He shall be set free unless otherwise lawfully held.

Dated signed and delivered this 23rd day of November 2006.

H. M. OKWENGU

JUDGE