



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL CASE NO. 7 OF 2015 (MURDER)

REPUBLIC.....PROSECUTOR

VERSUS

HARRISON KINYUA MAGO.....ACCUSED

J U D G M E N T

1. The accused person Harrison Kinyua Magu was arraigned in court on 9/4/2015 and charged with the offence of Murder contrary to **Section 203 as read with Section 204 of the Penal Code** vide the information dated 9/4/2015. It was alleged that on 23/3/2015 at Karia shopping centre within Kirinyaga County jointly with others not before court unlawfully murdered Josphat Mati Kamutu.
2. The plea was not taken on the said date because the Director of Public Prosecution through Mr. Omay, a prosecutions counsel presented a medical report by Doctor Thuo, consultant psychiatrist which indicated that the accused appeared to be mentally sick and was unfit to stand trial. It was recommended that he be admitted in Maximum Security Hospital (Mathare) for in-patient treatment and further evaluation.
3. The Judge upon considering that report, made an order that the accused be escorted to Mathare Mental Hospital for treatment and further evaluation.
4. The accused received treatment and a report dated 16/9/2015 was filed in court on 23/9/2015 by Dr. Wamukhoma for medical Superintendent Mathari Hospital confirming that the accused was capable of making his defence.
5. The accused was presented in court on 21/10/2015 and the Judge having noted the report from Mathari Hospital proceeded to read the charge to the accused. The accused person pleaded not guilty.
6. The matter proceeded to hearing and the State called nine (9) witnesses in efforts to prove the charge against the accused. The facts of the case are that the deceased Josphat Mati Kamutu was an assistant chief Karia Sub-Location in Kirinyaga Central. On 23/3/2015 the deceased was within Karia Shopping Centre when he was brutally attacked by a person who was armed with a panga. The deceased bled profusely and died while being treated at Kerugoya District Hospital where he had been rushed after the incident. The police were informed and they commenced the investigations. It transpired that on the night of 21/3/2015 the deceased who was a friend to Anne Wangui Kinyua (PW5) who was a former wife of the accused had called her informing her that he would go to her house. This was about 10.00 pm after PW5 closed her hotel business.
7. The deceased went to the house of Anne Wangui Kirujua (PW5) and as they were there, her hotel caught fire. The two went outside and put out the fire. The deceased spent the night there and left in the morning.
8. On 23/3/2015 the deceased called PW5 with the intention of going to her house. PW5 told him that she would call him after finishing what she was doing. PW5 then called the deceased and told him he could go to her place. As the deceased was near the house, she heard him shouting and asking, "**who is it, who is it.**" PW5 called an employee of the deceased and she went outside. She found the deceased lying down on the floor with injuries on the head. PW5 suspected the accused who is her husband as he used to call the deceased.
9. The police asked PW5 to take them to the house of the accused and she complied. The police conducted a search inside the house of the accused and they recovered four pangas. They also recovered bloodstained gumboots, a red jacket. PW5 was detained at the police station and while there, the accused sent for her and told her not to say he is the one who killed the deceased and if she did, he would kill her. PW5 reported the threat to the police.
10. The investigating officer, Cpl Joseph Ayama Mutesa (PW9) who investigated the matter went to the house of the accused on the material night after receiving information from PW5 that she suspected the accused who was not happy with her relationship with the deceased. PW9 found the accused who only had on a trouser. He recovered four pangas and one panga was wet indicating that it had just been washed

clean. PW 9 also saw a trouser which had blood stains and was placed on a table. It was a plastic (Polythene) which is water resistant and was muddy and wet. He also recovered a pair of gumboots behind the door which had bloodstains, a plastic container with some petrol and a red jacket.

11. PW9 had also recovered a jacket, a shirt and a trouser of the deceased which had blood stains. The recovered items were forwarded to the government chemist for analysis. The items were analysed by the government analyst, Henry Kiptoo Sang (PW8) at the Government Chemist Nairobi. He found that a trouser of the accused which was recovered by police soon after the incident had bloodstains which matched the blood for the deceased. The accused was then arraigned in court.

12. The court ruled that the accused had a case to answer and he opted to give his defence on oath. He denied that he killed the deceased and no trouser was taken from his house in his presence.

13. A summary of the evidence adduced by the prosecution witnesses

PW1 Gladys Wangui is the wife of the deceased. She testified that she received a call from her nephew one Paul Muturi informing her that her husband had been out several times. He further informed her that he had been rushed to Kerugoya District Hospital. She rushed to the hospital with her son Samuel and Paul Muturi. She found the deceased at the hospital but he passed away while undergoing treatment. It was her testimony that the deceased used to have affairs with women at Karia Centre where he used to stay in a leased house.

14. John Kinyua (PW2) testified that on the fateful night he heard screams whiel he was in his house at Karia Centre. He decided to go and find out. At the scene he found the deceased who was his father lying down with severe cut wounds on the head inflicted with a panga. He rushed the deceased to hospital but he lost the battle for survival and passed away at Kerugoya Hospital

15. Samuel Muriithi Matge (PW 3) testified that the deceased was his father. On the material day he was woken up at night by his mother who informed him that the deceased had been rushed to hospital after being cut several times. On arrival at the hospital he found the deceased was in critical condition and passed away while waiting for an X-ray.

16. On his part Johnson Maricho Kangangi (PW4), testified that on the material day he heard screams and rushed to the scene. He is the one who took the deceased to the hospital in his car. The next day he received information that the deceased had passed away. He went and transferred the body of the deceased to Mount Kenya Hospital.

17. **PW5 Anne Wangui Kinyua** testified that the accused is her former husband, they separated in January 2015. On 21.3.2015 at about 10:00pm she closed her hotel at karia, Jospaht mate called her and came to see her, she sensed the smell of petrol they both went outside and found a fire burning, they put off the fire with water. They stayed there till morning, the deceased left for his place of work. On 23.3.2015 there was no electricity so she closed her business early. The deceased was coming over, as he approached her house he remarked 'who is it?' three times but did not enter the house. She called kamau an employee of the deceased, he came and found his body outside her house lying, she came out and started screaming the deceased was rushed to hospital, but he passed on.

She was arrested at the hospital and taken to Kerugoya police station. She informed them she suspected her husband as he used to call the deceased, her affair with the deceased had lasted for 2 months. She escorted the police to her husband's home police recovered four pangas and blood stained gumboots. She was detained at the station for 21 days. The accused threatened to kill her if she said he was the one that killed the deceased while they were both detained. She testified she was detained for her own safety from the public.

18. **PW 6 Dr. Joseph Thuo** a psychiatrist at Embu Hospital testified that on 831-3-2015 the accused was brought to him from DCIO office for mental assessment. His findings were that he had abnormal thought process and delusions, he heard voices, he was thus mentally sick and not fit to stand trial. He submitted his report as P.Exh 2 and his request for the admission to Mathare hospital P.Exh 3.

19. **PW 7 Dr. Ogoi Makuyu Mandaraka** testified that he conducted the post-mortem. He issued the death certificate No. 725910 produced as exhibit 4 , the cause of death was loss of blood as a result of the severe head injuries.

20. **PW 8 Henry Kiptoo** testified that he was a government analyst at the government chemist, he submitted his analysis on items received from the DCI Kirinyaga on 9-4-2015, a panga, soiled black gumboots, dark blue trousers, black trousers with white stripes, a cream shirt and a black coat, and blood samples from the accused and deceased. He submitted his report on DNA analysis marked exhibit 9 his findings were that a long trouser marked as item c which was recovered from the house of the accused on the material night had blood stains which matched the blood of the deceased, namely a shirt marked E.

21. **PW 9 CPL Joseph Ayoma Mutesa No.71324** testified that he formerly worked at DCIO Kerugoya and that on 22.3.2015 he received a call at 9:00a.m from a lady claiming someone attempted to burn her with her boyfriend in her house he instructed her to report to the nearest police station. On 23.3.2015 at around 9:30 p.m him and CPL Mutua were informed of an assault at Karia market , they were informed the victim was rushed to hospital. PW5 accompanied them to the house of the accused person where they recovered the items mentioned, the wet panga exhibit 2, blood stained trousers exhibit 3, a pair of gumboots exhibit 1a and 1 b, and other items. They arrested the accused and he was charged.

22. The Defence case:

The accused gave a sworn defence and did not call any witness. His defence was that on the material night he went home at 8.00pm after selling chicken which he had bought earlier in the day at Ukambani. He slept immediately as he had a headache. Later at 2 00 am his wife went to his house accompanied by the police. They arrested him but did not carry anything from his house. Police beat him up and alleged that he had killed the deceased. He told the court that his wife was also a suspect and was placed in the cell for 14 days. It was his testimony that he had no knowledge that the deceased had an affair with his wife. He told the court that he is not the one who killed the deceased.

23. Analysis and Determination:

The accused is charged with the offence of murder.

The charge of murder is proved by three elements of the offence as stated in the Court of Appeal case of Anthony Ndegwa Ngari Republic [2014] eKLR, they include: -

- (a) the death of the deceased occurred;
- (b) that the accused committed the unlawful act which caused the death of the deceased; and
- (c) that the accused had malice aforethought.

(a) The death of the deceased

The death of the deceased has been proved the doctor who performed the postmortem and PW7 confirmed that *the cause of death was loss of blood as a result of the severe head injuries*. The postmortem form was produced as exhibit 4.

(b) Proof that accused persons committed the unlawful act which caused the death of the deceased (actus reus)

There is no eye witness account on who inflicted the brutal and fatal injuries on the deceased. The prosecution has relied upon circumstantial evidence to place the accused at the scene. They also rely on the testimony of the accused's wife PW5 that the accused had motive to kill the deceased. This is based on the fact that the accused had called the deceased on his mobile phone twice before the brutal murder.

The prosecution also relies on the government analyst report which showed that the clothes of the accused were stained with the blood of the deceased.

For the court to base a conviction on circumstantial evidence, the inculpatory facts must be strong and be incompatible with the innocence of the accused. The Court of Appeal in the case of Sawe- v- Republic (2003) eKLR stated as follows with regard to circumstantial evidence:

“ In order to justify a conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis, than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is burden which never shifts to the party accused.”

Where a case largely depends on circumstantial evidence, the danger of relying on suspicion must always be ruled out. Suspicion, no matter how strong cannot form a basis of conviction. It must be distinguished from circumstantial evidence which is based on facts pointing at the guilt of the person charged. The prosecution while discharging the burden of proof must satisfy the court that the various circumstances in the chain of events must be such as to rule out a reasonable possibility of the innocence of the accused.

24. It has been settled by the line of authorities from this court and the Court of Appeal that the sum total of the circumstances relied on when taken together must lead to the inevitable conclusion, that of establishing the guilt of the accused person. This principle has been well laid out, see Court of Appeal in Semeon Mblle -v- Republic Criminal Appeal No.45 of 1984 called the hallowed words laid down over 50 years ago in Republic- Versus Kipkering Arap Koske (1949) 16 E.A.C.A 135 that the inculpatory facts must be –

“ Incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused person and incompatible with his innocence.”

In order to justify the inference of guilt, the inculpatory facts must of necessity be incompatible with the innocence of the accused. See Simon Musoke -v- Republic (1958) E.A 715 where it was stated that-

“ It is necessary before drawing an inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which will weaken or destroy the inference of guilt.”

In this case the prosecution is relying on the fact that the accused was placed at the scene due to the presence of the deceased bloodstains on his clothes as confirmed by PW8. I have considered this evidence. I find that there are gaps as to whether the trouser marked (c) which is said to have been recovered from the house of the accused was in deed recovered from there. Firstly, PW9 the police officer who allegedly recovered the trouser was in company of PW5. When PW5 gave evidence, she testified that police recovered four pangas. A brown jacket and a pair of gumboots.

Apparently, when PW5- testified, she was not shown the said trouser. If indeed the trouser was recovered, PW5 would not have failed to see it.

Secondly, when PW9 testified he said he prepared an inventory of the items which he recovered from the accused. It was his evidence that he asked the accused to sign the inventory. That accused signed the inventory and said the gumboots were not his. Again surprisingly, this

inventory was not produced in court as exhibit to show the items which were recovered from the house of the accused.

25. Thirdly, when PW9 testified, he was shown the investigations diary and he admitted that what was indicated on the investigations diary of 24/3/2015 at 3.08 am after they returned to the police station from inquiries and came with the two suspects, accused and his wife what was booked in the OB as having been recovered from the home of accused wee, 4 pangas, and pair of gumboots (black) in colour, suspected to have some blood, kept as exhibits. The OB made no mention of the recovery of a bloodstained trouser. PW9 and his team never went back to the house of the accused to recover exhibits nor did he produce any OB report or investigations diary showing how the bloodstained trouser was recovered. To my mind. This bloodstained trouser was the key evidence in the prosecution case I do not see how PW9 and his team could have failed to book its recovery in the OB. Finally the exhibits memo form had handwritten parts and first item is (c) the trouser.

26. The report by the government analyst proved that the trouser had bloodstains which matched the blood of the deceased. This notwithstanding, I find the prosecution has failed to prove that it was recovered from the house of the accused. It is indeed true to hold that the prosecution failed completely to prove where the trouser was recovered. The evidence is insufficient to prove that the accused was at the scene of the murder as submitted in by the prosecutor. The claim by the prosecution that it was recovered by the house of the accused is a mere fabrication. The defence of the accused that no trouser was recovered was not dislodged.

27. What remains of the evidence by the prosecution is suspicion which was advanced by PW5 the estranged wife of the accused. Thought she never saw the accused, she was convinced in her suspicions that he is the one who killed the deceased. She had earlier suspect a former girlfriend of the deceased for attempting to burn her and the deceased alive. This inevitably means that it is not only the accused who could have executed the murder. The suspicion by the PW5 is of no consequence without tangible or circumstantial evidence to prove the guilt of the accused.

It cannot escape the mind of this court that the PW5 was the 1st suspect who police arrested and detained for 21 days. She was therefore an accomplice whose testimony required corroboration and none was forthcoming. The evidence of an accomplice is of the weakest kind. The rule on the evidence of an accomplice was stated in the following cases; ***Akibanga -v- Republic (UR), Camisio s/o Walwa -v- the Republic (1956) 23 E.A. C.A 453 and Republic -v- Baskerville (1916) 2 KB 685:***

“ Where on the trial of an accused person evidence is given against him by an accomplice, corroboration which the common law requires is corroboration in some material particulars tending to show that the accused committed the crime charged.

It is not enough that the corroboration shows the witness to have told the truth in matters unconnected to the guilt of the accused.”

Although the law does bar courts from relying on the evidence of an accomplice the laid down rule is that there be corroboration to the evidence. **Section 141 of the Evidence Act** provides:

“ An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.”

The evidence of PW5 which is uncorroborated and based on suspicion is insufficient.

PW5 was accused's wife but of her own volition decide to give evidence against the accused. She had separated with the accused and was having a love affair with the deceased. The accused did not object to her giving evidence but opted to leave the matter to the court to decide. The court relied on **Section 127 (3) of the Evidence Act (Cap 80 Laws of Kenya)** which provides:-

“ In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged—

(a) with the offence of bigamy; or

(b) with offences under the Sexual Offences Act; or

(c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.”

There is no dispute that the PW5 and the accused were husband and wife but had separated in January 2015. The PW5 was in a relationship with the deceased. Under **Section 127(2) of the Evidence Act**, a spouse is a competent witness for the defence. However, under **Section 127(3) of the Evidence Act** there is an exception as a spouse is a competent and compellable witness in criminal proceedings without the consent of such person. **Section 127(4) of the Evidence Act** provides as follows:-

“ Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

The Court of Appeal has held that it is necessary for a court to obtain consent of both the parties before allowing one spouse to testify. In the

case of Joseph Musyoki Kimatu -v- Republic Criminal Appeal No. 130/2013 the court stated –

“the fact of death of injury to one’s parent does not fall within.

The exception in section 127(3) of the Evidence Act. It was therefore necessary for the court to obtain consent of both the appellant and PW3 before putting PW3 into the witness stand to testify against the appellant, her husband failure to take this precautionary measure was fatal to the prosecution case.”

It follows that the prosecution for the offence of murder does not fall under the exception in **Section 127 (3) of the Evidence Act.**

Be thus as it may I did give the accused an opportunity to say whether he objected and in my view he did not object as he opted to leave the matter to the court to decide

The person murdered was the new found lover of the PW5. It was not fatal to the prosecution case that PW5 gave evidence as the accused did not object to her adducing evidence in court.

However, the law is well laid down that the marriage is binding during the lifetime of the parties unless it is dissolved according to law. The PW5 was still a lawful wife of the accused her lawful husband, their living in separation notwithstanding.

In conclusion:

For the reasons I have stated above, I have come to the conclusion that the prosecution case had gaps which raised reasonable doubts. It is trite that doubts in a prosecution case must be given to the accused. The prosecution has failed to prove the charge against the accused person beyond any reasonable doubts. The accused is entitled to an acquittal. I acquit him under **Section 324 (3) of the Criminal Procedure Code**

DATED, SIGNED AND DELIVERED AT CHUKA THIS 12TH DAY OF MAY 2021.

L.W. GITARI

JUDGE

12/5/2021

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

12/5/2021