



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL CASE NO. 27 OF 2017

REPUBLIC.....PROSECUTION

-VERSUS-

HILLARY KATHYAKA KYALO.....ACCUSED

JUDGMENT

1. **Hillary Kathyaka Kyalo** the accused, is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya. The particulars are that on the 21st day of September 2016 at Kasinga Village, Kavuko Sub-County within Makueni County, the accused murdered Wilson Kimuyu.

2. The prosecution called ten (10) witnesses in support of its case, while the accused gave a sworn statement without calling any witness.

3. **PW1 Kioko Muthoka**, the deceased's father, testified that on 21/09/2016, he received a report of his son's death. The body was taken by the police to Salama and he identified it. The accused was then arrested as the suspect. PW1 was shown a spade with blood as the murder weapon which he identified as EXB 1. It was also his evidence that the accused and deceased were good friends.

4. In cross examination by Mr. Hassan he denied that his deceased son had ever cut him with a panga or done something to him, and anyone saying that would be lying. He denied that the deceased was a thief and was being looked for by the police. He said the deceased and accused were sited somewhere at Kavuko market and were eating things like 'miraa'. He didn't know the owner of the bar where they were sited.

5. The deceased wore a t-shirt with a collar but he didn't know what the accused wore. He identified the accused by face only and not the clothes he wore. The deceased was in the home of the accused's father which is about 15 meters from that of accused. The deceased had his house where he slept at times and other times he slept at the accused's. He did not go to the accused upon hearing the news because he was upset. He denied hearing any noises that night as he was unwell. The deceased had left home at 9.00am and he didn't know what time he returned as they were asleep.

6. **PW2 Margaret Wahu Maina**, is a Government analyst at the Government chemist in Nairobi. She is a holder of a bachelor's degree in science from Makerere University and has worked at the Government chemist for seven years. On 07/10/2016, the office received the following items from Cpl Paul Komen; blood sample of deceased and accused as well as a spade which had a faded pink handle. They were to ascertain whether the spade had blood and its origin.

7. Their findings were that the spade had human blood and after generating DNA from the blood, it matched the DNA of the blood sample of the deceased. She produced the Exhibit Memo form as **Exb 2a** and the report of the Analyst as **Exb 2b**.

8. In cross examination, she gave her gazette No. as 9025/2018 and said it is in respect of narcotics. She analyzed the items from 18/04/2018 to July 2018. She was authorized to undertake the analysis by her boss. She said that for the lab, they only need their qualifications. She had been summoned by the Court to come and testify but she had no letter from her employer authorizing her to come and testify. It was her evidence that there were no traces in the accused's DNA to match those of the blood on the spade. The samples were in liquid state but it was not shown when they were taken. She profiled all parts of the spade but did not trace the accused's DNA anywhere on it.

9. In re-examination, she said that a deceased's blood is usually taken during post mortem and the accused may be taken to the hospital for blood extraction or to their offices for a buckle swab. They are allocated about eight files per month. The preliminaries are done quite fast but the analysis delays due to lack of chemicals, re-agents, breakdown of machines etc.

10. **PW3 Josephine K. Musyimi**, the chair of Nyumba Kumi, stated that on 21/09/2016, she was called by Mumo (a girl) and informed that there was a person lying on the ground. She flashed with her phone and found it was Kimuyu who was lying on his stomach and in his clothes. She called and informed Job Makau of community policing who went to the scene at about 6.00am. She left for duty and on returning home, she heard that the police had taken the body.

11. In cross examination, she said that the deceased was from their area and there was a time when he cut his father's fingers. He was a bad young man, who used to walk around at night stealing people's things on the roads. He would steal from people's vehicles and sell the items to villagers. She stated that PW1 and the deceased were always fighting each other, but things were now calm.
12. In re-examination, she said that she had never heard of the deceased being beaten by outsiders. It was usually their family quarrels. The deceased used to move around at night stealing and people would talk about it. There was a time that the deceased and his deceased brother beat up their married sister.
13. **PW4 Job Makau Nahashon**, testified that on 21/09/2016 at 5.58 am, he was called by PW3 who asked him to go to her place as there was a tragedy at the neighbor's. He went with Annah Mumbua and they found the deceased lying in the compound and bleeding from his head. There was a spade near the deceased which he identified as EXB1. He notified the assistant chief and the police officers. He wouldn't know what happened to the deceased.
14. Upon cross examination, he said he was aware of a time when the deceased beat his father and he (PW4) was even a witness for the father. The deceased had cut his father's hand and fingers. He used to drink alcohol and chew miraa, but he didn't know which work the deceased used to do. They used to receive reports from Salama police station that the deceased was a highway thief. EXB1 had blood on the body itself and not on the handle. They did not know the owner of the spade (EXB1).
15. **PW5 Anna Mumbua Kyalo**, stated that on 21/09/2016 at 4.30am, her daughter Ruth Mumo prepared and left for school but she returned and informed her of a person lying outside. She called her neighbor, Kamula Kawaya (*now deceased*), who arrived and said he would call nyumba kumi. The witness also called PW3 who came. PW5 could not identify the person lying there as she was still new in the area. From the way people were talking, the deceased was a dangerous person. The body was about 20 meters from her house. She confirmed not having heard any noise outside the house. Her eldest child is 26 years old and is the accused herein.
16. She further stated that all of them had spent the day at the farm and were tired, that evening. They had eaten supper together and parted to sleep. The accused had his own house which was separate from the two-roomed main house. He had no habit of roaming about at night. She just saw a person lying on their compound and then saw miraa, tobacco and his wallet. She saw blood on the ground and a spade near the deceased.
17. In cross examination, she reiterated that on 20/09/2016, she was harvesting maize with the accused. She said people used to talk badly about the deceased, and she heard that he had beaten and cut his father. The spade (EXB1) was not hers and she saw it for the first time that early morning. She had supper with the accused and never heard any noise from outside that night.
18. **PW6 Titus Ndeno Mainda**, the assistant chief of Kavuko Sub-Location, stated that on 21/09/2016 at about 7.00am, he was informed by PW4 that Hillary Kathyaka and Wilson Kimuyu had fought and Kimuyu had been seriously injured. He ran to the home of Kathyaka and found Kimuyu dead. There was a spade on top of Kimuyu's body and there was blood on his head. The home was full of people. He called the OCS, Salama police station who arrived and took the body away. The accused had been locked up in a house due to the anger of the crowd. The witness knew both the deceased and accused.
19. In cross examination, he said that the accused was well behaved and was new in his area, while the deceased was badly behaved. He said the police were looking for the deceased whom he knew as a thief. He was also aware that the deceased had assaulted his father at one time for wanting to sell land belonging to the church. He was later charged before Makindu court. When PW4 called, he never told him where the deceased and accused were. He agreed that he did not know the owner of the spade, and he did not investigate to know the owner.
20. He found the spade on top of the deceased's stomach and he had injuries on the head. The spade had blood all round it. He was later told that it was the accused's mother who locked him inside the house. The body was at Kyalo's home. He heard of no eye witness and did not enter the house where the accused had been locked.
21. **PW7 I.P Regina Mbaluka** was stood down after the defence objected to her testifying on the ground that she was not the investigating officer.
22. **PW8 Ruth Mumo Kyalo**, a hair dresser and resident of Nairobi, testified that on 21/09/2016, she woke up at 4.00am and went to the toilet. She saw a fallen person outside and returned to the house screaming. She informed her sisters Wayua, Ndalo and her mother (PW5). The body was about 25-30 metres from the door. PW5 called their neighbor Kamolo and he obliged. PW8 did not know the person who was lying down. The police arrived at 8.00am and by that time, people had already gathered.
23. Upon cross examination, she said that she had slept at 9.00pm and never heard any screams that night.
24. **PW9 Cpl Richard Rotich** of Ol Jorok Orok police station, testified that on 21/09/2016, he accompanied Senior Sergeant Kumbo and C.I. Abdi Hassan (OCS) to a murder scene at Kavuki sub location, Kasinga village. They found the deceased lying in a pool of blood and there was a bloody spade beside him. The body had two serious cuts on the mouth and head. There was a crowd and the suspect was in a guarded house. They escorted the accused to salama police station and took the body to Machakos level 5 hospital.
25. He testified that no one saw the accused committing the offence and it was only the investigating officer who could tell the Court how the accused was involved. The bloody spade had a metal handle and he produced it as **Exb 1**. He also produced the post mortem report as **Exb 3**, with the consent of the defence.
26. Further, PW9 testified that he used to know the deceased as Wilson Kimuyu Kioko and they had once arrested him for assaulting his father. The accused told them that he knew the deceased and the two were from the same area. He was arrested by members of the public.

27. In cross examination, he said that the accused lived on the compound where the deceased's body was found. He was being guarded in his house and was questioned by the OCS. The deceased was a known delinquent in the area. He read the postmortem report and said that the injuries were caused by the spade.

28. **PW10 CIP Nebert Marugu** of CID Headquarters Nairobi was formerly of DCI Mukaa. He testified that on 21/09/2016, he was requested by Cpl Komen to record a statement under inquiry with regard to a suspect Hillary Kathyaka Kyalo who had been arrested for murder in Kasinga village. The suspect was availed and the witness introduced himself to him. He informed him of what he was inquiring into *i.e* murder contrary to section 203 of the Penal Code. The suspect declined to sign and said that he could only thumbprint.

29. He cautioned him of what he was to record and they communicated in Kiswahili. He then proceeded to record the suspect's statement. He never threatened or intimidated him. The suspect thumb printed the 4 page statement and PW10 signed it. The suspect was calm and coherent as he gave his statement. He produced the statement as **Exb 4**.

30. In cross examination, he said that he was the sub county DCI and did not go to the crime scene. Further, he said that an OCS is the senior most officer at a station and must be a Chief Inspector and above. It was only him and the accused present as he recorded the statement. The accused said that he was attacked by the deceased who was armed with a knife. C.I. Abdi could not record the statement as he was part of the investigating team.

31. In re-examination, he said that the statement he recorded met all the criteria. That the accused went for a spade from the cattle *boma* and hit the deceased severally on the head and left him bleeding. His sisters Wayua and Mumo Kyalo were present when he did all this.

32. When placed on his defence the accused while under oath denied the charge and stated that he used to do farming and was from Kasinga village, Kabuko Location. He testified that on 21/09/2016, he arrived home at 11.00pm while drunk. He slept in his house upto morning when he was woken up by noises from the outside and he was told not to leave the house. The police arrived after two hours and opened the door for him. He was shocked to see the crowd. He saw a wanted person lying on the ground. The police were looking for the person because he was a thief and had even assaulted his father. He could only be found at night.

33. He said the person had an injury on the head and there was a spade at the scene. He did not know what happened to him neither did his mother and sisters know. There are three houses in their compound (*his dad's, his house and kitchen*). He was asked to change clothes and he was taken to Salama police station. He told the police that he did not know anything about the deceased. The police threatened to beat him and forced him to say and sign things he knew nothing about.

34. In cross examination by Mr. Kihara for the prosecution he said that he arrived at home from a birthday party at 11.00 pm while drunk and couldn't even tell how he reached home. He denied meeting with the deceased. He is a mason but was a farmer in 2016 and his tools were jembe, slasher and matok. The house next to his is 10 meters away and the next one is 5 meters from his mother's house. He lived with his mother and sisters as their dad was away working. He said the deceased used to beat his parents and he know PW1 as the deceased's father.

35. Further, he said that the deceased was killed elsewhere and taken to the scene. That his clothes had no blood but the t-shirt he used for working was at the place where the deceased lay and had blood. They had a footpath nearby (15 meters) away. The police were pressuring him to admit the charge and forced him to sign things he never said. He denied that the deceased had ever slept in his house. He told the court that the deceased was a thief and robber. He (*accused*) had stopped chewing miraa and taking alcohol. He didn't know if the accused had siblings.

36. In re-examination, he said that the shirt he used for farming was left outside and that he never left the house as it was surrounded. In answering a question from the Court, he said that the statement under inquiry was not made by him and he was forced to thumbprint it.

37. The accused did not call any witnesses.

38. The learned Prosecution Counsel, Mr. James Kihara, in his written submissions agrees that the confession tendered is at variance with the accused's defence but wonders how the accused knew the time that he got home if at all he was too drunk to know how he got home.

39. He submits that the confession was taken procedurally and the accused cannot be allowed to retract what he told the officer. On the issue of coercion, Mr. Kihara submits that the confession was recorded on the day the offence took place and no other witness had preceded him. He argues that the recording officer could not have framed the accused since he had never met him.

40. He submits that the circumstantial evidence adduced placed the accused at the murder scene. That no one knows why the accused killed the deceased and no one can tell whether the two had disagreed prior to the killing. In the absence of malice aforethought, Mr. Kihara calls upon this Court to convict on the offence of manslaughter.

41. Learned counsel Mr. Stanely Nthiwa for the accused submitted that there was no eye witness and no one heard anything.

42. He submits that any other person could have caused the death of the deceased because there were other people in the compound where he was found and there was a homestead near the accused's home. Counsel argues that the deceased was a known delinquent and could have been attacked by any of his victims.

Analysis and determination

43. The accused is facing a charge of murder which is defined under section 203 of the penal code as:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”.

44. One of the ingredients in a case of murder is malice aforethought which is defined under section 206 of the penal code as:

“(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

45. The prosecution has to prove the following three ingredients in order to secure a conviction for the charge of murder;

a) That the death of the deceased occurred and what its cause was.

b) That the death was caused by an unlawful act of commission or omission by the accused (*actus reus*).

c) That the accused had malice aforethought (*mens rea*) as he committed the said act.

Proof and cause of death

46. PW1, PW3, PW4, PW6 and PW9 found the deceased already dead and his body had injuries. His body was identified by PW1 and his sister for post mortem. He died as a result of a head injury secondary to blunt force (EXB3). His death was therefore sufficiently proved.

Proof that the death was caused by the accused’s unlawful act

47. This case is based on circumstantial evidence as well as a confession said to have been made by the accused person. With regard to circumstantial evidence, the Court of Appeal, in **Abanga alias Onyango –vs- Rep Cr. A No.32 of 1990(UR)**, set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. The court stated thus:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else”.

48. In **Sawe v Republic [2003] KLR 364** the court of Appeal said:

1. In order to justify, 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 hypotheses than that of his guilt.

2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.

3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.

49. With regard to confessions, they are generally inadmissible in Kenya unless they adhere to the relevant provisions of the Evidence Act and the rules promulgated there under.

50. **Section 25** of the Evidence Act defines a confession as follows:

“A confession comprises 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 reasonably be drawn that the person making it has committed an offence.”

51. Further, **section 25A** of the same Act provides that;

25A (1) 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 before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person’s choice.

(2) The Attorney General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court.”

52. The rules envisaged by sub rule (2) above are known as the **Evidence (Out of Court Confessions) Rules, 2009**. Rule 4 thereof provides *inter alia* that the recording officer;

a. Shall ask and record the Accused Person’s preferred language of communication;

b. Shall provide the Accused Person with an interpreter free of charge where he does not speak Kiswahili or English;

c. Shall ensure that the Accused Person is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;

d. Shall ensure that the Accused Person is informed of his right to have legal representation of his own choice among others;

e. Shall ask the Accused Person to nominate a third party to be present during the confession and the particulars of the third party and the relationship to the accused must be recorded.

53. **Rule 7** requires that the accused person be informed of the option to record his own statement in his preferred language or to have it recorded for him. **Rule 8** requires that the accused person be given the option to clarify or add anything in the statement after the same has been recorded. **Rule 5** requires the recording officer to administer caution before recording the statement.

54. After looking at **Exhibit 4**, I note that;

a) The recording officer did not ask the accused person to select a third party of his choice whom he wanted to be present during the recording of the statement. In fact, the evidence of PW10 was that it was only him and the accused person present as he recorded the statement.

b) The recording officer did not inform the accused person of his right to have an advocate of his choice present during the recording of the confession.

55. This statement may loosely be referred to as a confession. It is in fact a **statement under inquiry**. The moment the accused started to confess or state anything in that direction, PW10 should have stopped there and applied the full force of section 25 and 25A of the Evidence Act and the Evidence (out of court confessions) Rules 2009. He continued writing the so called “statement under inquiry” and that is what was produced. It is not surprising that Mr. Hassan then holding brief for Mr. Nthiwa did not contest its production.

56. In light of the above and bearing in mind the standard of proof required in criminal cases which is also applicable in the question of admissibility of confessions, my view is that exhibit 4 is not admissible. The rules are couched in mandatory terms and must be followed to the letter.

57. The question at this point is whether the circumstantial evidence is sufficient to sustain a conviction. PW4 testified that he found the deceased bleeding at the scene hence indicating that he was murdered within the compound where he was found. The blood on the spade found next to the deceased was determined to belong to him hence indicating that it was the murder weapon. The crime scene was the home where the accused and his family lived and it is intriguing that no one heard anything. It is however noteworthy that the witnesses present in the compound on the night of the murder were PW5, (the accused’s mother) and PW8, (the accused’s sister). The ownership of EXB1 was never established.

58. Be that as it may, the forensic evidence shows that the accused’s DNA was absent on the spade hence distancing the accused from it. The investigators should have at least dusted the spade for fingerprints. I also note that the accused talked about his bloody shirt found at the scene but the same was not produced in evidence. There is therefore no way this Court would know whose blood was on the shirt and whether the accused was wearing it on the night of the murder. Further, there is evidence to show that the deceased may have stepped on the toes of various members of his community hence raising the probability that other people had a motive of harming him.

59. The totality of the foregoing is that the circumstantial evidence herein does not lead to the conclusion that within all human probability, the crime was committed by the accused and none else. There are chances that the deceased was killed somewhere else and brought to the scene. I therefore find that the *actus reus* has not been proved in respect to the accused person. That bearing the case I shall not analyse the evidence for proof of malice aforethought (*Mens rea*).

60. In conclusion I find that the prosecution has failed to link the accused to the murder of the deceased. I hereby find him not guilty of the offence of murder and acquit him forthwith under section 322(1) criminal procedure code. He shall be released forthwith unless otherwise held under a separate warrant.

Orderly accordingly.

SIGNED AND DATED THIS 19TH DAY OF MAY, 2021 AT MILIMANI NAIROBI BY:

H. I. ONG’UDI

JUDGE

Delivered this 16th day of June, 2021 in open court at Makueni by:

GEORGE DULU

JUDGE