



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL CASE NO. 12 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**PAMELA CHEPKWEMOI NGEIYWA.....1<sup>ST</sup> ACCUSED**

**ROBERT EBEI EMURIA Alias ROBA.....2<sup>ND</sup> ACCUSED**

**JUDGEMENT**

The accused, **Pamela Chepkwemoi Ngeiywa** (1<sup>st</sup> accused) and **Robert Ebei Emuria Alias Roba** (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 offence were that on the night of 27<sup>th</sup> and 28<sup>th</sup> January 2016, at Chepchoina Farm within Trans Nzoia County, the accused jointly with others not before court, murdered **George Wanyonyi alias Barasa** (the deceased). When they were arraigned before this court, they pleaded not guilty to the charge. The Prosecution called seven (7) witnesses in its bid to establish the charge against the accused. After the close of the Prosecution's case, the accused were placed on their defence. They both gave sworn testimony. They gave alibi defence denying that they were not at the scene of crime on the particular night. They denied that they were in any way involved in the death of the accused. They urged the court to acquit them. After the close of both the Prosecution's and the defence's respective cases, written submissions were filed by both the prosecution and the defence. This court shall revert to the issues raised therein after setting out the facts according to the Prosecution.

**PW2, Joseph Olkau Reja** and **PW3 John Onyonyi Masanga** are respectively brother and father of the deceased. PW3 testified that sometime in October 2015, the deceased informed him that he had secured employment with the 1<sup>st</sup> accused as a casual labour at her farm at Chepchoina. The deceased told PW3 that the 1<sup>st</sup> accused was a good employer. He promised to return home in December of that year. He did not. From the testimony of PW2 and PW3, it was apparent that the two were not at the time worried as to the wellbeing of the deceased despite the fact that he did not go home in December as he had promised. On 5<sup>th</sup> November 2016, PW2 decided to visit the deceased. He was shocked to be informed the deceased had been found murdered in his employer's farm. He informed his father PW3. He was advised to report the matter to the police. PW2 made a report to the police at Endebess. It was then that he was informed that the deceased had been murdered at his place of employment. Since no one knew the whereabouts of the deceased's relatives at the time, he was buried by the State after his body remained unclaimed for a considerable period of time at Kitale District hospital mortuary. Other than photographs which were taken at the scene of crime, PW2 and PW3 did not see the body of the deceased.

It was apparent that when PW2 made the report to the Police, that's when investigations commenced in earnest. The evidence which had been gathered earlier was revisited. PW4 P.C. Salim Abduba Abdalla told the court that he was one of the investigators in the case. He recalled that on 28<sup>th</sup> January 2016, he was requested by the District Criminal Investigations Officer (DCIO) to accompany him to a scene of crime at Chepchoina. Upon reaching the scene, he saw the body of the deceased. It appeared to have been dragged into a maize plantation from the house of the 1<sup>st</sup> accused. He entered the house. He saw fresh cow dung on the floor. There were blood stains. He found a hoe. He suspected it to be the Murder weapon. He arrested PW6 Henry Chesuto Chemnai who was at the house at the time. On interrogating him, PW6 told him that the people who killed the deceased were the 2<sup>nd</sup> accused and one Samson Chemoron under instructions of the 1<sup>st</sup> accused.

**PW5 CPL Benjamin Koono**, a scenes of crime officer then based at Kitale DCI's office testified that he visited the scene of crime on 28<sup>th</sup> January 2016. The scene was at Robinson farm, Chepchoina settlement scheme. The body of the deceased was lying in a farm near the house of the 1<sup>st</sup> accused. He had deep cut wound on the face – the skull was open and the brain matter was oozing out. He took photographs at the scene. In total, he took 26 photographs which he produced into evidence. Apart from the photographs of the body of the deceased, he took photographs of the 1<sup>st</sup> accused's house including a hoe, plastic bucket and a 200 litres water container which appeared to be bloodstained. He also took photographs of the floor of the house which appeared to have blood stains. He collected the items which appeared to have blood stains including the clothes worn by PW6 which appeared to be blood stained. The bundle of photographs was produced into evidence as Prosecutions Exhibit No. 2.

The items that were recovered from the Scenes of crime were sent to the government Chemist for analysis. They were analyzed by PW1 Elizabeth Onyingo. She testified that the DNA analysis revealed that the blood stains on the hoe, and the plastic container belonged to the

deceased. The bucket and the T-shirt were not bloodstained. She produced the report as Prosecution's exhibit No.1.

**PW7 Dr. Moses Okumu** a doctor based at Kitale County Referral Hospital produced the Post mortem report which was prepared by Dr Obala. Dr Obala was no longer working at the hospital hence PW7's testimony. He testified that postmortem was conducted on the body of the deceased on 3<sup>rd</sup> February 2016. On examination, it revealed that he had multiple face cuts and fractures. Right ear was missing. There was deep cut wound on the back of the head consistent with a sharp object. The brain tissue was exposed. He had injury on chest that resulted in multiple rib fractures that cause haemothorax (Collection of blood in chest cavity). He formed the opinion that the deceased's death was caused by severe head and chest injuries. The Post mortem report was produced as prosecution's Exhibit No. 3.

**PW6 Henry Chesuto Chemna** testified that on the material evening of 27<sup>th</sup> January 2016, he went to the house of the 1<sup>st</sup> accused. It was about 6.30 pm. He found the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused and one Samson Chemoron (his brother) taking alcohol. PW6 wanted to join them but he was not welcomed. Instead, he was told to escort some two girls to a nearby GSU Camp. He recalled that when he left to escort the girls, he left the 2<sup>nd</sup> accused, Samson and the deceased at the 1<sup>st</sup> accused's house. When he returned, he found Samson and the 2<sup>nd</sup> accused standing outside the house. He noted that outside the house there were blood stains. When he inquired what had caused the bloodstains, he was warned by the 2<sup>nd</sup> accused not to talk about it. He slept in the house.

The following morning, PW6 saw many vehicles in the farm. It belonged to the police. He learnt that the deceased had been killed the previous night. The two accused persons were no longer at the scene. He was arrested and detained by the Police for a period of two weeks as they were conducting investigations. No evidence was found connecting him with the crime. He was released. He was of the opinion that the accused persons and Samson knew the person or persons who killed the deceased. Samson died on 11<sup>th</sup> December 2019. He pointed out the reason why he suspected the 2<sup>nd</sup> accused for being involved in the death of the deceased was because the 2<sup>nd</sup> accused threatened him with dire consequences if he spoke to anyone about what he saw on the material night. PW6 testified that he did not see nor hear anything when the deceased was killed. Despite the threats, PW6 slept at the 1<sup>st</sup> accused's house alone on the material night.

The case was investigated by Chief Inspector James Saoko (PW8). He testified that when the murder was reported, he visited the scene of crime on 28<sup>th</sup> January 2016. He was with a team of Police officers. He noted the injuries that had been inflicted on the deceased. They were on his head and chest. He observed the scene of crime. There was no evidence of a struggle but it appeared that the body had been dragged from somewhere else to the scene. There was a blood trail which lead to the 1<sup>st</sup> accused house. The house was deserted. The door had been left ajar. He entered the house. There were blood stains all over the sitting room of the house. There was a water container which was blood stains. The floor was freshly smeared with cow dung but blood was still visible on the ground.

PW8 commenced investigations and learnt that PW6 was the 1<sup>st</sup> accused's employee. He was at the scene. On interrogating him, he was able to ascertain that it was the accused persons and another person who had killed the deceased. He collected the exhibits from the scene including the hoe which he formed the opinion was the murder weapon. It took some time before the accused persons were arrested and later arraigned in court for the offence that they were charged with. He confirmed that during the initial investigations, he arrested PW6 as a suspect but later released him. He produced the Plastic container, hoe and bucket as Prosecutions exhibits No. 4, 5 and 6 respectively.

After the close of the Prosecution's case, Chemitei J who heard the case was transferred from the Jurisdiction of the court. The accused persons had no objection to this court proceeding with the case from where it had reached. Upon evaluation of the evidence adduced by the prosecution's witnesses, this court formed the view that a prima facie case had been established to enable this court place the accused persons to their defence.

Both accused persons gave sworn testimony. They denied that they were at the scene of crime when the deceased was killed. The 1<sup>st</sup> accused testified that she was at her other home at Kapenguria at the time. She heard that the deceased had been killed at her farm. She denied that the deceased was her employee. Two and a half years later, In August 2018, she was informed by a Kenya Police Reservist that she was being looked for by the DCIO, Kitale. On her own volition, she went to the Police station. She was arrested and escorted to Endebess Police Station where she was informed of the charge. She denied knowing PW6 at the material time. She urged the court to take into account that PW6 was a prevaricating witness – he was not truthful. She was emphatic that she was not involved in the killing of the deceased.

On his part, the 2<sup>nd</sup> accused testified that he was arrested on 23<sup>rd</sup> November 2018 at a drinking den. He denied ever having been acquainted with the deceased. He denied that he was known by the name "Roba" at his village. He insisted that he was called Robert. He denied the allegation made by PW6 to the effect that he was known to him. Whereas the 2<sup>nd</sup> accused admitted that he was a supporter of 1<sup>st</sup> accused in her capacity as a politician, he denied the allegation made by the Prosecution that the 1<sup>st</sup> accused had procured him to kill the deceased.

In all criminal cases, it is the duty of the prosecution to establish the charge brought against the accused persons. The burden of establishing every element that constitute the charge is on the prosecution. This burden never shifts to the accused persons. The accused persons are under no legal obligation to prove their innocence. The Prosecution must discharge its burden of proof to the required standard of proof beyond any reasonable doubt.

In the present case, it was evident that the prosecution relied on circumstantial evidence in its bid to secure the conviction of the accused persons. It is often said that circumstantial is the best evidence as it eliminates all other persons other than the accused persons as the persons who committed the offence. The Court of Appeal in *PON Vs Republic [2019] eKLR* held thus:

**“ To base a conviction entirely or substantially upon circumstantial evidence, it is necessary that the guilt of the suspect should not only be rational inference but also its should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the suspect not guilty .....**

Simon Musoke Vs R (supra) introduce an additional factor to the foregoing, to the effect that before drawing the inference of the accused's guilt from circumstantial evidence, the court must be sure that there are no co-existing circumstances or factors which would weaken or destroy that inference. Over the years, these structures have been developed further by way of explanation. For example, in the case of Omar Mzungu Chimera V R Criminal Appeal No 56 of 1998, the court stated that:

**“It is settled that when a case vests on entirety circumstantial evidence such evidence must satisfy three tests:**

- i) The circumstances from which the inference of guilt is to be drawn, must be cogently and firmly established;**
- ii) Those circumstances should be of a definite tendency unerringly pointing towards the 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”.**

The Prosecution's star witness was PW6. He testified that on the evening before the deceased's body was found, he saw the deceased in company of the 1<sup>st</sup> accused, the 2<sup>nd</sup> accused and one Samson. Samson is now deceased. They were at the 1<sup>st</sup> accused's house taking traditional brew i.e chang'aa. PW6 was not invited to the drinking party. He was asked by the 1<sup>st</sup> accused to escort some girls to a nearby GSU Camp. When he came back, it was at night. He did not find the deceased. He testified that he found the 2<sup>nd</sup> accused with Samson. He saw blood stains in the house. He tried to inquire from the 2<sup>nd</sup> accused whose blood it was but he was warned off. PW6 testified that he was threatened by the 2<sup>nd</sup> accused not to disclose what he had seen to anyone. Curiously, PW6 stated that despite all the blood stains in the house, he slept in the same house that night. He slept in the house alone.

PW8 testified that when he visited the house the following day as part of his investigations, he saw blood at the floor of the house, among other places. An attempt had been made to cover up the blood stains using cow dung. The cow dung was fresh. PW8 arrested PW6. On interrogation, PW6 told him that it was the accused persons and Samson who killed the deceased. PW6 did not repeat this in Court. Infact when he testified before court, PW6 was a reluctant witness. He had to be stood down so that he could properly recollect his testimony. He told the court that whereas he did not see either accused persons kill the deceased, from the reaction of the 2<sup>nd</sup> accused when he inquired whose blood it was that had been spilled in the house, he formed the view that it was the 2<sup>nd</sup> accused and Samson that killed the deceased. He went further to say that they did so under the instructions of the 1<sup>st</sup> accused.

It was not clear from PW6's evidence what could have motivated the 1<sup>st</sup> accused or the 2<sup>nd</sup> accused, or both to want to kill the deceased. No evidence of the existence of any disagreement between the four of them was placed before the court. The court is left to speculate on what would have caused the accused persons (if they were indeed the persons who killed the deceased) to kill the deceased. From PW8's testimony, it was clear that there were other persons at the homestead when it was claimed the deceased was killed. One of the suspects was PW6. PW6 testimony can be considered as that of an accomplice. Being a suspect, it cannot be ruled out that he implicated the accused persons with the crime to exonerate himself.

Whereas this court acknowledges what is provided in **Section 141** of the **Evidence Act** that:

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

The Courts have over the years held that corroboration on material aspects of such accomplice's evidence is required. For instance, the Court of Appeal in Bernard Munungi Njau V Republic [1979] eKLR held that:

**“ ...We would also draw attention to R V Baskerville [1916] 2 KB 658, where the rule is adequately stated:**

**“ where on a trial of an accused person evidence is given against him by an accomplice, the corroboration which the common law requires is corroboration in some material particular 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 the matter unconnected with the guilt of the accused.”**

In the present case, this court finds it difficult to believe the story of PW6 in circumstances where he was a suspect before the accused persons were charged. The evidence adduced by the Prosecution, including forensic evidence only established the fact that the deceased was killed in the 1<sup>st</sup> accused's house and then his body was dragged to the scene where it was recovered. It did not establish who killed the deceased. According to PW6, there were other persons who were at the house on evening before the body of the deceased was discovered. PW8, explained that he could not trace any person who was said to have been at the house on that particular evening to corroborate the testimony of PW6. This court holds that the absence of such corroborative evidence weakens the Prosecution's case because it essentially meant that the prosecution is relying on uncorroborated evidence of an accomplice.

It was only PW6's testimony that placed the accused persons at the scene of crime. In their defence, the accused persons gave alibi defence. They, respectively, testified that they were not at the scene of crime when the deceased was killed. With the weak evidence adduced by the prosecution, this court cannot reach an irresistible conclusion that the alibi defence of the accused was displaced by the prosecution's testimony. The alibi defence may we have been the true position.

Finally, the hictus between the time the crime was committed and the arrest of the accused persons appears to have negatively impacted the prosecution's case. The relatives of the deceased were not traced when his body was discovered. He was buried as unknown African male

by the County Government of Trans Nzoia. About two years later, the family of the deceased discovered, to their shock, that their kin had been killed and his body buried in an unidentified grave. It is this discovery that jolted the investigations back to life. By that time, material witnesses who could have been procured to establish the prosecution's case had dispersed and could not be traced. This is the unenviable position that the prosecution found itself.

Enough said. The prosecution failed to establish the charge of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code** to the required standard of proof beyond any reasonable doubt. The accused persons are hereby acquitted of the charge. They are set at liberty unless otherwise lawful held. It is so ordered.

**DATED AT KITALE THIS 7TH DAY OF OCTOBER 2021.**

**L. KIMARU**

**JUDGE**