



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 20 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ERICK MAINA KAMWIGU.....ACCUSED

J U D G M E N T

A. Introduction

1. The accused herein is charged with murder contrary to **Section 203** as read with **Section 204 of the Penal Code**.
2. The particulars of the offence are that on the 27/10/2013 at Kaithege Village, Kyeni North Location Runyenjes of Embu District, the accused murdered one John Kathauthi Nyaga.
3. The accused pleaded not guilty to the charge and the matter proceeded for full trial. The prosecution called seven (7) witnesses in support of their case which is summarised herein.

B. Prosecution Case

4. PW1 testified that on the material day at around 8pm, she was returning from the market in the company of one Mathew Mugendi and the deceased who is her father in law. She further stated that when they reached the accused's compound, they spotted the accused and his wife in the kitchen and greeted them loudly and they answered the greetings. PW1 stated that they then proceeded with their journey but the accused immediately followed them flashing a torch and ordered them to stop.
5. The trio stopped after the accused's wife screamed for help saying that PW1 and her companions were cattle thieves. The accused then shouted "wacha nichukue panga" (meaning: let me pick a panga) and rushed back to his house. PW1 sensed danger and escaped cutting across the accused's land to her home where she reported what had happened to her husband.
6. The following day PW1 received information that the deceased had been slashed to death and was lying in the accused's shamba. PW1 testified that she had known the accused since 1993 when she married into the deceased's family and that the accused was a young man and as such she was familiar with his voice. Further, it was her testimony that she saw the accused at close range as he flashed the torch. At the time the deceased was attacked, PW1 said she had left the scene.
7. PW2 testified that he received sad news on the 29/10/2013 that his father had been killed and his body dumped in the accused's tea plantation where members of public had spotted it that morning. PW2 went to the scene where he saw the body with deep cuts on the head, hands and legs. PW2 further testified that the deceased's clothes were soaked with blood and further that there was a lot of blood outside the accused's that was house covered with soil to conceal it.
8. PW2 further testified that the police at the scene ordered demolition of the latrine at the accused's home and that a blood stained stick was recovered by a neighbour to the accused.
9. PW3 testified that the deceased, PW1 and another visited his bar on the material day at around 7.30pm and left later in the evening. The following day he was told that the deceased had been found dead.
10. The doctor PW4, performed the post-mortem on the deceased and testified that he found the cause of death to have been head injury a result of trauma. He produced his report in court. The psychiatrist PW5, testified that he examined and found the accused mentally fit to stand trial.

11. PW6, the government analyst testified that he received some materials from the police in Runyenjes, being soil samples, two pieces of sticks as well as blood samples of the deceased. It was his conclusion that the DNA profile generated from the stick matched the deceased's DNA blood sample.

12. PW7, the investigating officer testified that the accused reported the incident of the night of 27th and 28th October 2013 and that after carrying out investigations he later charged the accused with causing the death of the deceased. It was his testimony that he collected various materials from the scene of crime and forwarded them to the Government Analyst for analysis.

C. Accused's Case

13. The accused gave a sworn statement as DW1 and stated that on the 27/10/2013, he was with a friend called Rose at Miami Restaurant in Runyenjes from around 4:45pm until 11:30pm after which he departed via boda boda and arrived at his home. He then slept from around 11:45 pm till the following morning when he woke up. He further testified that the following morning while out in his shamba at around 6:30am, he discovered the body that lay face down but did not recognise it. It was not until later when he saw the body turned over that he recognised it was that of the deceased.

14. DW2, Rose Pauline Mumbi, testified that the accused was her intimate friend since 2010 and that on the material date they spent time together at Miami Restaurant in Runyenjes from around 5pm until 11pm when they parted ways

D. Analysis of the Law

15. After carefully perusing the evidence and considering all the exhibits and reports, it is clear to me that the case for the prosecution is based on circumstantial evidence. There is no witness who told the court that they saw the accused committing this offence. There is evidence by PW1 that she heard the accused state "wacha nichukue panga" after which she escaped to save her life. Before this happened, the accused had ordered PW1 and the deceased to stop as his wife shouted that they were cattle thieves.

16. The offence of murder is deemed to have been committed when any person who of malice aforethought causes death of another person by an unlawful act or omission as provided under Section 203 of the Penal Code. This definition clearly demonstrates the ingredients of murder that the prosecution must prove to the standard of beyond reasonable doubt before an accused person charged with murder can be convicted. The prosecution must prove death of the deceased occurred, the act or omission causing that death and the unlawfulness of that act or omission, that the person unlawfully acted or omitted to act and finally, the intention of the person who so acted or omitted to act.

17. In determining whether the prosecution has met the threshold of proving the offence of murder beyond reasonable doubt, the court will have regard to the evidence on record and any other material before it. Evidence of surrounding circumstances to a crime has been referred to as the best evidence in decided cases. Courts in this country have taken cognizance of this fact in various decisions. In **Neema Mwandoro Ndurya v. R [2008] eKLR**, the Court of Appeal cited with approval the case of **R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the court stated that: **"Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics."**

18. However, caution is called for when relying on such evidence. In the case of **Teper v. R [1952] AC at p. 489** it was held: -

"Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference."

19. The facts in this case are clear that the deceased died on the night of 27/10/2013. His body was found lying face down in the shamba of one Njogu next to the land of the accused. There was evidence from PW7 that the body had been dragged along from the home of the accused. Whilst at the accused's home, the police ordered demolition of the latrine where a blood stained stick was recovered.

20. The government analyst in his report found that the DNA profile generated from the sticks matched the deceased's DNA blood sample. The doctor who examined the body of the deceased told the court that he formed the opinion that the cause of death was head injury due secondary to trauma.

21. PW1 stated that when they reached the accused compound, they spotted the accused and his wife in the kitchen and greeted them loudly and that the two responded to the greetings. PW1 explained how the accused followed them as walked past his house flashing a torch ordered them to stop. Immediately the trio stopped, the accused's wife screamed for help saying that PW1 and her companions were thieves. The accused then proceeded to his house to pick a panga. PW1 sensed danger and escaped cutting across the accused's land to her home where she reported what had happened to her husband. The deceased was subsequently found in the accused's tea plantation with deep cuts on his head, hands and legs prompting police to commence investigations.

22. On the defence of the accused, I am alive to the principle that the law places no burden on him to prove his innocence. However, in my view, the defence raises more questions than answers. PW7 said the accused reported the discovery of the body the following morning and said he had recognized it as that of the deceased because of the sweater the deceased was wearing. The accused changed his story in his defence when he said he did not recognize the body before he reported its discovery adding that he recognised it only when police turned it face up.

23. The accused called a witness DW2 who said she was with him in the bar at the material time and that they parted at 11.00pm. This was disproved by the evidence of PW1 whom the court found a credible witness and who described what happened at the scene in very vivid details. She saw and spoke to the accused at the scene of crime.

24. PW1 said she had lived with the accused in the same neighbourhood for about twenty (20) years and she was familiar with his voice. She recognised the accused as he sat in his kitchen and as he followed her flashing a torch. In both instances the accused spoke and was positively identified. The witness had no doubt at all as to who had greeted her and who followed her and the deceased a short while later. It was the wife of the accused who branded the deceased and PW1 as cattle thieves. It was pretentious or malice on part of the accused and his wife to allege that PW1 and the deceased were thieves soon after they had exchanged greetings.

25. Although PW1 had escaped from the scene at the time the deceased was attacked, the accused is the only person who had the opportunity to commit the offence at that particular time as opposed to any other person. The accused and his wife were the only aggressors at the scene from whom PW1 managed to flee.

26. The accused did not in his defence comment on the state of affairs at the scene as described by the investigating officer; that blood stained sticks were found at the scene, that there were signs of the body having been dragged from the scene about three metres from the door of the accused's house; blood stains covered with soil along the dragging area and the report of the Government Analyst PW6 that the blood samples of the deceased matched with the blood on the sticks that were produced in evidence.

27. The question that arises is thus; if the accused did not murder the deceased, how did the deceased's blood end up on the exhibits recovered from his latrine. PW1 left the accused at the scene as he rushed to pick a panga. From the report of PW5, most of the injuries were caused by a sharp object, a panga being one such weapon. As for the sticks, they were described as blunt but with sharp edges. The deceased had blunt injuries too and fractures on the head and on the lower limbs. All these injuries caused the death of the deceased due to secondary trauma.

28. It is my considered opinion that the alibi of the accused was untruthful and not plausible as weighed against the credible and reliable evidence of PW1, PW3, PW6 and PW7.

29. PW1 told the court that her sandals were left at the scene as she ran for her safety. The sandals were recovered at the scene near the house of the accused the following day by police and identified to belong to PW1. This supports the credibility of PW1 that she was at the scene with the deceased immediately before he was attacked. Her evidence places the accused squarely at the scene.

30. In respect to the defence, I am alive to the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi (Ssentale v. Uganda [1968] EA 36). The prosecution always bears the burden of disproving the alibi and proving the appellant's guilt (Wang'ombe v. Republic [1976-80] 1 KLR 1683).

31. However, the accused was required to raise the defence of alibi at the earliest opportunity to enable the prosecution and the investigating officer time to check it out to determine its veracity or lack thereof. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In R. v. Sukha Singh s/o Wazir Singh & Others (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

32. The accused in this case of R. v. Sukha Singh s/o Wazir Singh (supra) raised his defence of alibi six years after the offence was committed. Is it an after-thought? In Festo Androa ASenua v. Uganda, Cr. App. No. 1 of 1998 the Court made the following:

"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

33. I am convinced beyond any reasonable doubt that all the circumstantial evidence satisfies the principles of circumstantial evidence as enunciated in numerous authorities including the case of R. v. Kipkering Arap Koske & Another [1949] 16 EACA 135, in the Court of Appeal for Eastern Africa had this to say:

"In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

34. This principle was expanded by the same Court in Simoni Musoke v R. [1958] EA 715, which cited with approval the following passage from the Privy Council decision in Teper v R. [1952] AC 480 at P.489, to add the following:

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference".

35. I am satisfied that the evidence of PW1, PW3, PW6 and PW7 points the guilty at no other person but the accused.

36. I find that the prosecution have established that the unlawful act of the accused caused the death of the deceased.

37. The prosecution must prove malice aforethought on part of the accused. Malice aforethought has been defined under **Section 206 of the Penal Code** in the following manner:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances

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.”

38. From the evidence in this case, the accused had not planned to attack the deceased. There is evidence that the deceased, PW1 and another passed on a foot path through the home compound of the accused. PW1 said that the path they used to get to their home and that there was no fence surrounding the home.

39. The attack on the deceased was characterised by very multiple grave injuries on the head, face, upper and lower limbs with fractures on the lower limbs and on the head. The deceased died immediately or a few hours after the attack considering that the accused had all the time to drag the body from his compound to some distance. The instant or immediate death after the attack and the grievous nature of the injuries inflicted is evidence that the accused intended to kill the deceased.

40. It is my considered opinion that the prosecution have established malice aforethought on part of the accused.

41. I find that the prosecution have proved the offence of murder against the accused person beyond any reasonable doubt. I find the accused guilty of the offence under Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

42. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF JANUARY, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for State

Mr. Momanyi for Accused

Accused present