



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL CASE NUMBER 18 OF 2015**

**REPUBLIC**

**VERSUS**

**CORNELIUS KARIUKI NDUMIA**

**JUDGMENT**

The accused was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal code, cap 63 Laws of Kenya. According to the information, on the night of 16<sup>th</sup> and 17<sup>th</sup> days of August 2015 at Nairutia area in Nyeri county within the Republic of Kenya, jointly with others not before Court, the accused murdered Stephen Maina Thumbi. He pleaded not guilty to the charge after he had been assessed by the psychiatrist (PW8) and found fit to take plea and stand trial.

**Opportuna Nyokabi Guandaru (PW1)**, the deceased's mother, testified that the accused was her employee at all material times and that on 13<sup>th</sup> August 2015 he worked the whole day at her home with the deceased up to at around 10 :00 P.M. when they left together. Apparently, they both had dinner at her house before they left for their homes.

On the morning of 14<sup>th</sup> August 2015, the accused came back with her phone which the deceased had left with the previous evening for recharging. When she inquired of the whereabouts of the deceased, the accused told her that he had gone to look for work. Since the phone had not been charged, she asked the accused to take it to the deceased's father for charging. He then went on with his duties as usual.

Opportuna further testified that on 15 August 2015, the accused went to pay dowry for his wife and came back on 16 August 2015. He even briefed her how the ceremony went. However, he never reported to work on the following day, the 17 August 2015 and was never seen until he was arrested.

She learnt of the death of the deceased on 17 August 2015. He had been burnt beyond recognition and it is only at the mortuary that the body was identified as that of the deceased. It had been recovered on the accused's land which shares a common boundary with her own land. It was her evidence that the accused's clothes were recovered at the same scene where the charred remains of the deceased were found.

During cross examination, she testified that the deceased's house was closer to the accused's house than hers. She testified further that the accused had worked for her for many years. He lived with the deceased before each of them settled in their own houses. The accused would cook for her and would only retire to bed after she had taken her drugs. For the entire period the accused worked for her, they had never disagreed on anything and neither were there any differences between the accused and the deceased that she was aware of. She was also aware that they both reared cows and goats.

**Joseph Theuri (PW2)** testified that he had been with the deceased on 13 August 2015 from morning to 2:00 P.M. when the deceased left to go and water his animals. They were to meet the following day at the deceased's mother's home; however, the deceased never turned up. He learned of the deceased's death on 17 August 2015. It was his evidence that he helped identify the deceased's body in the mortuary. The deceased, according to his evidence, had a broken tooth and it is this unique feature that helped him and his sister identify the body at the mortuary.

The deceased's wife, **Nancy Wanjiru (PW3)**, testified that she lived in Kerugoya, separately from her husband at the material time. On 17 August 2015, the deceased's father called and informed her that the deceased was missing. She came to Nairutia where the deceased lived to join the rest of the family members in tracing him; despite their efforts, they could not trace the deceased. Together with the deceased's father they proceeded to the police station on 18 August 2015 to make a report of a missing person.

She knew the accused as the deceased's friend; the deceased would also engage him in menial jobs from time to time. In the course of investigations, she accompanied the deceased's family members and a police officer to the accused's home where there they found some of the deceased's livestock.

She admitted, however, that the accused and the deceased were friends and it was normal for the deceased to leave his livestock with the accused whenever he was away.

In the course of cross examination, she admitted that she had differed with the deceased and it is because of the differences between them that she left to go back to her parents at Kerugoya. She also testified that a few days before the deceased's death, his son who was one of the children she was living with had visited the deceased.

**Charles Kingori Kamangu (PW4)** testified that on 16 August 2015, at about midnight, he was informed by his wife of fire at the lower side of his farm; to be precise, on one Ndumia's side of the farm. He proceeded to the scene where he found a burnt human body. He called the chief to inform him but the chief could not come; he then called the police who came and collected the body together with pieces of clothes that were found at the scene. The accused, according to him, was the son of Ndumia, the owner of the land on which the deceased was burnt.

**Mohamed Gitonga Guandaru (PW5)**, the deceased's elder brother, testified that on 13 August 2015, he had left the deceased working at their parents' home together with one Theuri Kibira. On 15 August 2015, he got information that someone had been burnt in at the accused's farm. Initially it was thought that it was the accused who had been burnt since he had not been seen for some time. It is only on 19 August 2015 when they went to the mortuary when they discovered that in fact it was the deceased who had perished and not the accused. He identified the body as that of his brother because the latter had a broken tooth.

**Muthui Muniyiri (PW6)** testified that he was the deceased's cousin and that on 12 August 2015, he had been with the deceased apparently when he came to buy building construction materials. On 17 August 2015, he learnt of someone who had been burnt; since the accused had disappeared about the same time, the burnt person was thought to be the accused. However, he learnt later that in fact, it was the deceased who was the victim. He admitted that he was questioned on whether he was involved in the murder of the deceased during the investigation because of an existing land dispute.

The pathologist, **Dr. Obiero Okoth (PW7)** testified that the deceased's body was identified to him for post-mortem purposes by **Nancy Wanjiru Maina** and **Lucy Wangare Guandaru**. According to him, the body was of an African male. It had sustained 100% burns and reduced to 'dry bones'; identification was only possible because of the chipped upper incisor tooth that the deceased was known to have. Upon examination, the pathologist observed that there were multiple fractures and lacerations all over the body. Despite the severe burns, there was no soot noted on the respiratory tract. There was also subdural hematoma on the right of the nervous system. In the pathologist's opinion, the death was as a result of a head injury secondary to blunt trauma. The burns were post-mortem; that is, the burns were inflicted after the deceased's death.

The investigation officer was police constable Orwa; at the time of the hearing, the court was informed that he was down with some illness and so he could not testify; his statement was instead produced in court by police constable **Hasan Ndindi (PW8)**. Looking at that statement there is nothing the officer established independently and much of the statement consists of what the rest of the witnesses told him. Some parts of it consist are hearsay evidence because the people who are alleged to be sources of information did not testify.

When he was put on his defence, the accused gave a sworn testimony and admitted that he worked at the deceased's mother's home. On 14 August 2015 he worked as usual up to around 4:00 P.M. when he left for his home. On 15 August 2015, he travelled with his family to Nyandarua and came back late in the evening at about 8:00 P.M. He visited the deceased's mother (PW1) together with his wife on 16 August 2015 and even cooked for her. He thereafter left for Nyandarua, where he has land, to harvest his potatoes. As at the time he left little was known about the deceased's death although it was common knowledge that he had not been seen for some time. On or about 30 August 2015, he was arrested in Nyandarua while driving a herd of cows; the herd was suspected to have been stolen. While he was in police custody at Mailo Nne Police station, officers from Nairutia police station came for him and handed him over to Nyeri police station. It was his evidence that the deceased's mother never told him about the deceased on 16 August 2015. He testified further that he was not present when the deceased's body was recovered and, in any case, there was no evidence that he was involved in the murder of the deceased. As far as the deceased's cattle are concerned, it was his testimony that at times the deceased would leave his livestock with him to look after them whenever he was away.

And this is all there was to evidence.

When I consider this evidence I am satisfied that the fact of death of the deceased has been proved beyond any shadow of doubt; I am also persuaded that going by the nature and extent of injuries which the deceased sustained, there is no doubt that the death must have been as a result of an unlawful act by another person. Thus, at least the first two elements of the offence of murder as defined under section 203 of the Penal Code have been satisfied. That section reads as follows:

### **203. Murder**

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

The only other elements which the state was bound to prove are that the accused is the person who has been referred to in this section as 'any person' who perpetrated the crime and that if he was such a person he had the necessary mens rea or the mental element for the offence.

On the first limb of this question, is clear and it is common ground between the defence and the state that the prosecution case against the accused is wholly based on indirect or circumstantial evidence.

The law on circumstantial evidence is this: it is trite that an accused may not only be safely convicted on such evidence but also that this type of evidence has been hailed as the best evidence. It was so held in **Tumuheire versus Uganda (1967) E.A at pages 328 and 331** that:

***“It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person as in the present case.”***

As to how this evidence should be examined, the court said:

**“As we said by Lord Normand in *Teper versus Republic* (1952) A.C. at page 489:**

***‘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 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’***

**In *R versus Taylor, Weaver and Donovan* (1928), 21 Cr. App. Reports at page 20) the principle as regards the application of circumstantial evidence was enunciated in these words:**

***‘Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.’***

It follows that an accused may be safely convicted on circumstantial evidence alone as long as that evidence is wholly inconsistent with his innocence or; put differently, it is consistent with his guilt.

Where, however, the circumstances proved are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. (See **Sarkar on Evidence, 12th Edition, Page 34**).

But in order to justify an inference of guilt, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred. These conditions may be summarised as follows:

- (a) The circumstances from which the conclusion is drawn should be fully established;
- (b) All the facts should be consistent with the hypothesis;
- (c) The circumstances should be of a conclusive nature and tendency;
- (d) The circumstances should exclude every hypothesis but one proposed to be proved. (see **Sarkar** (supra), at page 34)

Besides **Tumuheire versus Uganda** (supra) this law has been applied in several other cases, closer home, where this type of evidence has had to be considered; they include **Republic versus Kipkering Arap Koske & Another** (1949) XVI EACA 135 and **Simon Musoke versus Republic** (1958) EA 715.

In **Wills on Circumstantial Evidence** (6th Edition, page 311), the conditions for conviction based on circumstantial evidence were summarised as:

***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.***

This passage was quoted with approval and applied in **Republic versus Kipkering Arap Koske & Another** (supra).

When the evidence against the accused is viewed from this legal perspective, a reasonable doubt arises whether the accused is the person who murdered the deceased. Scouring through the evidence, the only connection provided by the prosecution linking the accused with the deceased’s murder is the evidence that the accused is the last person who was seen with the deceased and, secondly, that some of the deceased’s livestock was found at the accused’s home.

This last link is outrightly preposterous because it was never alleged that the deceased’s stock had been stolen and in any event, the evidence suggests that the deceased and the accused were not only neighbours but also that the deceased would at times leave his livestock with the accused whenever he was away. This was according to the evidence of the deceased’s wife (PW3). The accused could not possibly steal the deceased’s stock and murder him in the process only for him to keep the same stock at his home, in the same neighbourhood.

The evidence that the accused was the last person who was seen by the deceased was given by opportuna (PW1), the deceased’s mother. It was her evidence that they left her house together on 13 August 2015 at 10:00 P.M. But they went to the separate homes and it is possible that anything could have happened to either of them that night without the knowledge of the other. In any event, there was no concrete evidence that the deceased may have been murdered on the night of 13 August 2015. There was evidence that owing to the nature of his work, he would disappear and come back afterwards and perhaps that was the reason why his absence on 14 August 2015 or even 15 August

2015 did not cause much anxiety. According to the accused's brother, Mohamed Gitonga Guandaru (PW5), he never bothered looking for deceased the first two days after he disappeared because, his mother (PW1) had told him that the deceased had gone to look for work. According to Charles Munyiri (PW6), until the deceased body was recovered, they never suspected anything bad could have happened to the deceased because 'as a mason he would leave and come back later. We also thought he would come back.'

According to this witness, he himself was suspected to have murdered the deceased because of some land dispute.

The deceased's mother's evidence on her relationship with the deceased and the latter's relationship with the accused did not help matters, as far as the prosecution case is concerned; it was her evidence that the accused had been her employee for many years and for all that time, they related well. She also testified that her deceased son related well with the accused and, as matter of fact, they used to live together. The deceased's wife also testified that her husband was friends with the accused. There is therefore no reason that would have driven the accused to murder the deceased.

I would, in these circumstances conclude that there are no inculpatory facts to justify an inference of guilt on the part of the accused; and what has been presented as the inculpatory facts are not necessarily incompatible with the innocence of the accused, or incapable of explanation upon any other reasonable hypothesis than that of his guilt. Instead, all I gather from these facts are co-existing circumstances that weaken or destroy the inference of guilt.

The only other question that ordinarily would be left for determination is that of malice aforethought; however, having held that the it has not been proved beyond doubt that the accused murdered the deceased, the question whether there was malice aforethought does not arise. And with that I hold that the prosecution has not proved its case against the accused to the required standard. He is therefore acquitted of the murder charge and is set at liberty unless he is lawfully held. It so ordered.

**Signed, dated and delivered this 15 July 2020.**

**Ngaah Jairus**

**JUDGE**