



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CRIMINAL CASE NO. 30 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOSHUA KIMINGICHI SIMIYU.....ACCUSED

JUDGMENT

1. **Joshua Kimingichi Simiyu** is charged with an offence of murder contrary to section 203 as read with section 204 of the Penal Code.
2. The particulars of the offence are that on the night of 12th day of December 2016 at Mware sub-location of Aboloi location in **Teso North** sub-county of **Busia** County, murdered **Respa Ayaa Simiyu**.
3. On the material day at about 1 a.m. the deceased and her husband were roused from sleep by some fire which was burning their house. The deceased attempted to go out before her husband. She was however hit with a hoe at the door and she fell inside. The prosecution maintained that it was the accused who battered the deceased. She subsequently succumbed to the injuries.
4. The accused in his defence denied to have been involved in the offence and pleaded an alibi.
5. The issues for determination are:
 - a) Whether the culprit who fatally injured the deceased was identified; and
 - b) Whether the alibi defence tendered by the accused is convincing.
6. This case revolves around the issue of the identity of the perpetrator of the offence. According to the prosecution, the perpetrator of the offence was recognized by his father, David Simiyu (PW2) and Collins Simiyu (PW3), his 13years old step brother. The accused tendered an alibi in his defence. It is trite law when purported identification or recognition in unfavourable circumstances is contested, care must be taken as to how such an identification or recognition came to be made. This was held in the celebrated case of **R. vs. Turnbull & Others [1976] 3 ALL ER 549**. Lord Widgery CJ said:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before?

At page 552 he went on to say:

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

In the instant case I will be guided by this decision that has been followed religiously in our jurisdiction.

7. We are able to appreciate this case if we can mentally recreate the scene from the evidence of the two key witnesses who purported to recognize the accused. Let us start from the house. David Simiyu (PW2) was woken up by the issue of the fire. He testified that his wife on seeing the fire, opened the door and ran out as he was trying to use a blanket to prevent the fire. Before she reached out, she fell inside. When

he went to check on her, he was hit on the shoulder. This is when he saw the accused with the help of the moonlight and the light from the burning house. He went back into the burning house and picked a machete and a struggle between him and the accused ensued. Together with a 14 years old girl called Pauline, they raised an alarm and his brother Julius arrived. This is when the accused left him and ran into the bush.

8. Collins Simiyu (PW3) is a 13 years old boy and a son of David Simiyu (PW2) and the deceased. His version was that he was sharing the house with his parents and was woken up by the screams of his mother. He went out and from a distance of about five paces, he saw the accused hitting his mother on the legs with a hoe. His mother was at the door. At the time his mother was hit by the accused, his father was outside. After hitting the deceased, the accused dropped the hoe and went downwards.

9. If we momentarily pause here, we are confronted by some disturbing unanswered questions.

a) Curiously, Collins (PW3) does not testify about any fire burning their house.

b) How did Collins and his father (PW2) get out of the house if indeed the deceased never went beyond the door?

10. Other than these questions that the evidence does not provide any answers to, there are contradictions in the evidence of father and son. David Simiyu (PW2) testified that he raised an alarm with a girl called Pauline. Her son did not mention this girl. From his evidence it was like she never existed. The prosecution did not call her as a witness or offer any explanation as to why she was not called to testify. Whereas David Simiyu (PW2) testified that he went for a machete and had a struggle with the accused before he ran into a bush, Collins (PW3) testified that after hitting his mother on the legs, the accused dropped the hoe and walked downwards.

11. Julius Muhebi Babu (PW1) is the brother of David Simiyu (PW2). He said that when he reached at the latter's he found the deceased lying down bleeding and the house was on fire. His brother informed him that she was injured by the accused. He however did not find the accused at the scene. This contradicted his brother's version that the accused ran away on seeing Julius (PW1)

12. Whether the house of the deceased and her husband was on fire is further complicated by the evidence of Wellington Kitutu (PW4) the area assistant chief. His testimony is that when he visited the home, he only saw the evidence of an attempt to burn the house. He saw some thatch grass that had been pulled. This therefore contradicted the evidence of PW2 when he said that the light of the burning house helped him to recognize his son as the culprit.

There are so many contradictions in the evidence of the prosecution witnesses which makes it difficult for them to be taken as credible witnesses. The Court of appeal in the case of **Ndungu Kimanyi vs. Republic [1979] KLR 283**, held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

In the instant case I am unable to find the purported recognition evidence credible not only due to unfavourable circumstances obtaining at the time of the purported recognition, but also due to the many contradictions in the evidence of the key prosecution witnesses.

13. The accused in his defence contended that he was not at the scene of the offence. In the written submissions the prosecution contended that the accused ought to have raised the alibi defence at the earliest opportunity and relied on **R. vs. Sukha Singh % Wazir Singh & Others (1939) 6 EACA 145**. This is what the Court of Appeal for Eastern Africa 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 a 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.

This position has been moderated with time. In the case of **Wang'ombe vs. Republic [1976-80] 1 KLR 1683** it was held that the burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution. The legal position obtaining presently is what was spelled out in the case of **Kiarie vs. Republic [1984] KLR** where the Court of Appeal held:

An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

In the instant case, I will endeavour to establish whether the alibi defence proffered by the accused herein weighed against the entire evidence on record, raises some reasonable doubts.

14. I have already raised the issue of credibility of the key prosecution witnesses. This touches on the issue whether the appellant was at the scene or not as claimed by David Simiyu (PW2) and his son Collins Simiyu (PW3). Having evaluated their evidence and found it with material contradictions on what the accused is alleged to have done, weighing it with the evidence of Julius (PW1) and that of the area assistant chief Wellington Kitutu (PW4), I am persuaded to believe that the alibi defence tendered by the accused could be true.

15. After a careful analysis of the evidence on record, I make a finding that the prosecution has not proved its case against the accused person whom I acquit of the charge of murder. I set him free unless if otherwise lawfully held.

DELIVERED and SIGNED at BUSIA this 6th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE