



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO 96 OF 2014

REPUBLIC STATE

VERSUS

SAMUEL KARANJA KAMAU.....ACCUSED

JUDGMENT

1. Penina Wangui Karanja (“Penina”) lives in Munyeki Village in Olkalau, Nyandarua County. She lives in the same homestead as her father, her son, Stephen Karanja Waweru (“Accused Person”) and her brother, Peter Wainaina Karanja. However, each lives in their own house within the homestead.

2. Penina had a key to her son’s house. On 20/09/2014, she needed a jembe she had lent her son. Since she had not seen her son in about four days and the son’s house was locked, she used her key to let herself into her son’s house. Her aim was to collect the jembe and go to the shamba. Instead, the shock of her life awaited her. As soon as she opened the door, she was confronted by the sight of a body lying under the bed. The body lay under the bed with only the feet jutting out.

3. Penina thought the worst had happened: she assumed that her son, the Accused Person was dead. She screamed, attracting the attention of her brother Peter. She also called her daughter who lives in Nairobi to inform her that her brother was dead. It was her daughter who told her that the Accused Person was alive and was in Nairobi with her.

4. Later on, Penina learnt that the body under her son’s bed was that of the Deceased. She had no idea how it got there. She had last seen her son three days prior to the discovery of the body. That was, as far as Penina remembered, on 18/09/2014 in the evening. The Accused Person was preparing soup for his grandfather (Penina’s father) when Penina last saw him in the evening of 18/09/2014.

5. This was the essence of Penina’s testimony in this case where she testified as PW1. Her brother, Peter, testified next. He confirmed hearing his sister (Penina) screaming at about 7:30am on 20/09/2014. He rushed to the site and found her sister had collapsed outside the Accused Person’s house. She told him what she had seen in the house. Peter went to the house, opened it and saw the same thing: a dead body covered in a sack, with only feet visible under the bed. He immediately called the Assistant Chief, Anne Wangui. The Administrator called the Police and made her way, accompanied by a village Elder, to the scene.

6. Peter, who testified as PW2, testified that when the Police came they opened the door and took photographs. At that point, he noticed blood splattered all over the floor. When the Police took the body to the mortuary, at the prompting of his other brother, they checked and identified the body as the Deceased’s. Peter testified that he then called a relative in Nairobi and instructed them to report to the Police so that the Accused Person could be arrested. He was arrested and held at Kiamumbi Police Station in Kiambu.

7. Another of the Accused Person’s uncles, Joseph Mwangi Karanja, also testified as PW3. His testimony was that on 17/09/2014, he was at his house on in Olkalau location at around 7:30pm when the Accused Person came by with an offer to sell him a radio at Kshs. 500/-. He refused to take the offer but lent the Accused Person Kshs. 500/-. He did not see his nephew for the next three days. On 20/09/2014, as he was having breakfast with his brother (Peter, PW2), he heard his sister (Penina, PW1) screaming. He accompanied Peter to see what was happening. That is when they discovered the body under the bed. His testimony of what happened thereafter is in all material respects the same as that of Peter (PW2).

8. At Olkalao Hospital Mortuary, the autopsy was conducted by Dr. Patrick Kariuki on 25/09/2014. The doctor testified as PW4. He found a body of a male adult aged around 25 years old. It had a face injury and an open skull fracture with exposed brain tissue. The neck had markings with a fracture of the cervical column (at C2 and C3). The body also had an open fracture of the clavical left side and collapsed left side of the chest wall. There was no fracture of the upper or lower limbs. The liver was ruptured.

9. Upon examination, the doctor concluded that the cause of death was multiple severe trauma to the head, chest, and abdomen leading to

severe internal hemorrhage. Dr. Kariuki produced the Post Mortem Report as Exhibit 1 for the Prosecution.

10. The final prosecution witness was PC Samuel Kankana, the Investigation Officer. He received the report of the incident at the Police Station. He visited the scene in the company of the OCS. He recalls finding the body covered in two nylon papers as it lay in a pool of blood. It had a bruise on the head. He also found a blood-stained jembe in the house. He arranged for the body to be removed and taken to Olkalau Mortuary. He then collaborated with the Police in Nairobi for the arrest of the Accused Person who he said had run away there.

11. PC Kankana testified that his investigations revealed that the Deceased was a close friend of the Deceased. He concluded that the two must have disagreed and the Accused Person hit the Deceased with the jembe. Later on, the mother of the Deceased went to the Police to report that the Deceased had disappeared.

12. The Learned Justice Maureen Odera heard all the Prosecution witnesses before the Prosecution closed its case. She formed the opinion that there was enough evidence to put the Accused Person on his defence in a ruling dated 29/06/2018. I read the ruling on her behalf as the Learned Judge had been transferred out the station by that time. I took over the conduct of the case from then.

13. The Accused Person elected to give an unsworn statement. His story was that he got a call from his employer to go help with some work in Nairobi on 15/9/2014. The following day, the Accused Person told the Court, he woke up and travelled to Nairobi. While there, he met the employer, David Njuguna. He helped with the work as a conductor of matatu.

14. The Accused Person said he worked in Nairobi for the next few days. Then, on 20/9/2014, he said that he received a call from his cousin, David Njau. David told him that someone had died in his house and people were looking for him to lynch him. Since he was in Kahawa West at the time, he says that he went to Kiamumbi Police Station where he was arrested. Officers from Olkalau Police Station came for him the following Sunday. On getting to Olkalau, he said that he found two more people who were said to be his accomplices. He told the Court that one of the two was the son of the Chief; and that the two of them were killed by a mob. He said that he left Ol Kalau before the death and does not know anything about it.

15. The charge facing the Accused Person is murder contrary to section 203 as read together with section 204 of the Penal Code. He is accused of the murder of the Deceased, Stephen Waweru Waweru, on the 18th day of September, 2014 at Munyeki Village, Munyeki Sub-location, Olkalou Division of Nyandarua County.

16. Given the evidence before the Court, the Court's task is to determine if the Prosecution case has been established beyond reasonable doubt that the Accused Person indeed murdered the Deceased.

17. The offence of murder is defined by section 203 of the Penal Code, Cap 63, Laws of Kenya as follows:

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

18. To successfully obtain a guilty verdict in a murder charge, the Prosecution therefore is required to tender sufficient proof of the following three crucial ingredients:

- a. That death of the victim occurred (*actus reus*);
- b. That the death was caused by an unlawful act or omission by the Accused Person; and
- c. The unlawful act or omission was actuated by *malice aforethought*.

19. On the other hand, under section 206 of the Penal Code, *malice aforethought* is established, when there is evidence of:

- d. Intention to cause death of or grievous harm to any person whether that person is the one who actually died or not;
- e. 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;
- f. Intent to commit a felony; or
- g. 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.

20. Neither the Prosecution nor the defence made any submissions. It is incumbent upon the Court, then, to announce the verdict based only on the evidence on record.

21. There is no question that the *actus reus* was established. The Deceased's body was found under the Accused Person's bed in his house. All the witnesses who testified saw the body. The doctor (PW4) performed autopsy on it. It was identified to him by a relative of the Deceased. the

22. The only two things for determination are, first, whether it was the Accused Person who caused death of the Deceased; and, two, if he did so with malice aforethought.

23. It is readily obvious that none of the witnesses saw the Accused Person allegedly killing the Deceased. Hence, the Prosecution hopes to establish its case based on circumstantial evidence.

24. It is true that circumstantial evidence is, often, the best evidence. So said the Court of Appeal in **Neema Mwandoro Ndurya v. R [2008] eKLR**, where it cited with approval an English Case, **R v Taylor Weaver and Donovan (1928) 21 Cr. App. R 20** where the English 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.

25. In **Joan Chebichi Sawe versus Republic [2003] eKLR** the principles that guide the Court in evaluating circumstantial evidence were laid out in three tests as follows:-

- a. *The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*
- b. *Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
- c. *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.*

26. Earlier on, **Kipkering Arap Koske versus R. [1949] 16 EACA 135**, long considered a *locus classicus* on this issue, had compressed the principles into two thus:

- (a) *The inculpatory facts must be incompatible with the innocence of the accused.*
- (b) *The facts must be capable of no other conclusion or explanation except the guilt of the accused.*

27. However, as several Courts have pointed out, even where the Court is satisfied that the above threshold has been met, the Court is enjoined to exercise caution before applying the above threshold to the facts before it. As the Court of Appeal remarked in **Simon Musoke versus Republic [1958] EA 715** while citing **Teper versus R. [1952] AC 480,489** before drawing the inference of an Accused Person's guilt from circumstantial evidence it is necessary for the court to be sure that there are no other existing circumstances which would weaken or destroy the inference.

28. Applying these principles to the present case, can we truly say that the “*circumstances taken cumulatively... 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 Person and none else*”? I am persuaded that this is the case here. I say so for two obvious reasons:

a. First, the body of the Deceased was found in the house of the Accused Person. I believed the witnesses who narrated what happened – beginning with Peninah, the Accused Person's own mother – and the Accused Person's own uncles. They straightforwardly narrated who the body was discovered partly hidden under the Accused Person's body in his house. The Investigating Officer confirmed the narrative. Given these facts, it behooved the Accused Person to offer a narrative explaining how the body happened to be hidden under the bed in his house. He gave no such explanation raising the permissible inference that he was involved in the murder of the Deceased.

b. Second, the Accused Person had the opportunity to commit the murder. As the Accused Person's mother (PW1) testified, she saw the Accused Person in the night of 18/09/2014 when the murder supposedly happened. He went into his house to sleep. That is where the body was found three days later. The house was locked from the outside, meaning that the murder happened inside the house or, alternatively, outside the house and then the body brought inside the house. It is a permissible presumption that only the Accused Person had access to the house during this period. He, therefore, needed to displace the presumption that he did not use the opportunity to commit the murder. He did not do so.

c. Third, the post-incident behaviour of the Accused Person permits an inference that he knew something about the murder of the Deceased. Around the time of the death of the Deceased, the Accused Person disappeared from home. He did not inform any of his relatives including his mother that he was planning to be away. He just vanished. Moreover, he went to the house of his uncle, Joseph Mwangi Karanja, where he borrowed Kshs. 500/-. He told his uncle that the money to repay a person he owed money. He did not disclose to his uncle that he would use the money to travel to Nairobi, or that he had been called to Nairobi for work. This suspicious conduct of the Accused Person points to a guilty mind and is consistent with the Prosecution theory that it is the Accused Person who murdered the Deceased.

29. The Accused Person's defence, considered in the context of the Prosecution case, is simply incredible and implausible. As argued above, the Accused Person's in disappearing from Ol Kalou without informing his relatives raises reasonable suspicion that he was running away from justice. Secondly, the Accused Person did not place on the table any plausible evidence to show that he was not present at the time and place where the murder was committed. His unsworn statement that he had been called to Nairobi by his employer is so implausible as to have no inherent possibility that it could be true. It simply does not raise any doubt at all, let alone reasonable doubt as to whether it is the Accused Person who committed the murder.

30. In the circumstances of this case I conclude, upon appropriate evaluation of the evidence presented that it can properly be said that the “*inculpatory fact is incompatible with the innocence of the Accused, and is incapable of explanation upon any other reasonable hypothesis than that of his guilt.*” See **R v Kipkering Arap Koske & Another 16 EACA 135**.

31. It is, therefore, my finding that the Prosecution has proved beyond reasonable doubt all the three elements of murder. The Deceased was killed by the Accused Person; and the killing was without any justifiable excuse. Consequently, I find the Accused Person guilty in the murder of Stephen Waweru Waweru contrary to section 203 as read together with section 204 of the Penal Code. I hereby convict him accordingly.

32. Orders accordingly.

Dated and Delivered at Nakuru this 6th day of June, 2019.

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JOEL NGUGI

JUDGE