



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL CASE NO. 7 OF 2015

REPUBLIC.....RESPONDENT

VERSUS

ERASTUS NJUGUNA MIRIN'GU.....ACCUSED

JUDGEMENT

1. The Accused in this cause was charged with the murder of his son, the particulars of which were that between the night of 31st December 2014 and the morning of 1st January 2015 at Nginduri village in Githunguri Sub-County in Kiambu County murdered **HENRY NJUGUNA NJUGUNA**. Initially the entire family of the accused were arrested by the police and locked up only for the wife and the sons to be released leaving the accused alone to face the charge herein.

2. He first appeared in court on 21/01/2015 before Justice Korir when a plea of not guilty was recorded in his favour. He thereafter appeared before Ombija J. (as he then was) who on 2/07/2015 heard his application for bond and by a Ruling dated 16/07/2015 released him on bond. On 31/03/2010 his trial commenced before me and at the end of which I heard and recorded the evidence of nine (9) prosecution witnesses and two defence witnesses.

PROSECUTION CASE

3. The prosecution case was that on the night of 31st December 2014, the deceased who was a son of the accused came back home when his parents were watching TV waiting to welcome the New Year. He knocked on the window and was eventually allowed into the house. **PW1 EUNICE WANJIRU NJUGUNA** who also testified on behalf of the defence as **DW1** noticed that he had an injury on his hand but declined to be given medical assistance. In his drunken status, he slept on the floor where he urinated and defecated on the chairs. They left him in the sitting room as they went to sleep only for him to fall down from his house the following morning.

4. **PW2 GEORGE WAITHAKA MWAURA** testified that on 1/01/2015 at 12.05 p.m. the accused went to seek him in his house and told him that his son had fallen down from his house and died. He gave this information to the Chief and went with the accused to his home where he found the body of the deceased at the stairs to his house. He then accompanied the accused to the police station where they made a report. The police then came and took the body of the deceased together with the accused, his wife and two children. It was his evidence that the body had a cut wound on the head. He had seen the deceased three (3) days before in good health. In cross-examination he stated that he had known the accused for a long time and he was a man of good standing being a Choirmaster and a good father to all his children.

5. **PW3 MERCY WANGUI** a sister-in-law of the accused testified that she went to his compound on 1/01/2015 where she heard the deceased ask for water which was taken to him by his brother called **Kinuthia** into his house, only for him to come back running with information that he had found the deceased lying down at the foot of the stairs to his house. When she went to where the deceased was, she noticed that he had a cut on his forehead and hand. In cross-examination she confirmed that when she went to the compound of the accused, the deceased was still alive because she heard him requesting for water.

6. **PW4 BHN**, a minor aged twelve (12) years who was found capable of understanding the purposes and nature of oath, testified that on the New Year's Eve while watching TV with his parents, the deceased came to the house and broke the door glass through which he entered into the house while drunk. He kept on making noise while bleeding until he fell asleep having declined to be taken to the hospital by their parents. The next morning he heard him open the door and went to his house which was constructed on elevated timber which they used to call "*gorofa*". He later on called for water which he took to him at 1.00 pm. He heard him fall down from his house. He was subsequently arrested together with his parents and brother but the three were released.

7. **PW5 ACN**, aged sixteen (16) years and a brother of the deceased and son of the accused had gone for a night vigil prayers on 31/12/2014 and came back home at 5.00 a.m. When he entered the room he found the deceased sleeping on the floor which had blood stains and the house was smelling of human faeces. When he inquired of what had happened he was told that the deceased had knocked the window glasses

with his hand. He spoke with the deceased whom he gave water before going to his room to sleep. The next day the deceased called him and asked him to go and pick some Kshs.10 (ten) in his jacket to go buy for him strawberry. He went to his room and found the jacket covered with faeces. He got the money and bought for him strawberry. In cross-examination he confirmed having used a rug to wipe the blood and faeces which were on the floor and sofa set and threw them in the pit latrine. He confirmed that on 1/01/2015 in the morning the deceased was alive.

8. PW6 CORP. VIRGINIA WANJIKU on 2/01/2015 visited the house of the accused where there was visible blood stains inside and outside the main house, pit latrine and the storey structure which was the deceased's house. She collected blood samples from the said spots and took photographs at the scene. **PW7 ELIZABETH WAITHERA ONYIEGO** received exhibits collected from the scene with instructions to determine blood stains on them which she did and as a result of the said examination formed an opinion that the DNA profile generated from the said exhibits matched the DNA profile of unknown origin.

9. PW8 ASP. JANE MUHIA the OCS of the area received the accused at the station on 1/01/2015 at 15.40 hours who made a report that his son had fallen from his house and died. She proceeded to the scene where she found many members of the public. She looked at the body and saw two deep cut wounds on the forehead and hand. She confirmed that the deceased's house was nine feet high. There were blood marks on the wooden stairs, on the wall and floor of the house, there were blood stains which led them to the accused's house, which also had blood stains. The deceased's body was clean as if it had been washed and oiled. They were able to recover a *panga* with blood stains, a basin with table clothes with blood stains and chair covers with blood stains. When asked why the *panga* had blood stains the accused stated that it had been used to kill a chicken the previous night.

10. It was her further evidence that the blood stains led them to the pit latrine and the accused informed them that he had thrown the deceased's jacket there which had blood stains and had faeces over it. When she interrogated the accused, it was her evidence that the accused told her that the deceased came home at night while drunk and started to knock the glass window using his hand and forced his way into the house where they struggled to disarm him. This was according to her, corroborated by the mother of the deceased and a brother of the deceased **Chege PW5** who told her that when he came back home, he found the house in a mess with human blood and faeces which he cleaned. It was her theory that the accused had confrontation with the deceased and that when he reported to the station he said that the deceased had disturbed him a lot but had now left which she thought meant he was dead.

11. In cross-examination she stated that the accused informed her that the deceased had died at 3.00 p.m. and that at the scene the body looked clean having been washed and oiled. She further contended that none of the witnesses were forced to record their statements and that the accused and his wife were not forced to sign their statements so that their children could be released. She confirmed that the accused's window to the sitting room was broken and there were blood droplets from it to the chimney, the toilet and the house of the deceased. She confirmed that before then a report had been made against the accused by someone who claimed that he had his debt.

12. PW9 DR. PETER NDEGWA produced post-mortem report confirming the cause of death as cerebral injuries due to blunt force trauma. He confirmed that it could be caused through a fall on a blunt surface.

DEFENCE CASE

13. When put on his defence the accused called his wife as **DW1** who testified that before midnight of 31/10/2014 the accused came to their home and knocked on the window asking whether she was present at home. He then entered into the sitting room having wrapped his hand in his jacket which he said had been cut by the window pane. She spoke with the deceased for about thirty minutes before he fell asleep on the chair. When she woke up at 6.00 a.m. she found him still sleeping on the chair. He then put on his shoes and went to his house where she heard him talk with someone called **Sammy** who had come to visit him. It was her evidence that she had found their sitting room dirty with blood and faeces. She was then visited by a neighbour called **Mercy** whom the deceased asked for water which was taken to him by his brother. They later on heard the deceased fall down from his house.

14. They went to the scene and later on reported to the police station and were locked up, the children for two days, herself nine days and the accused one month. She confirmed that while at the station she talked with the OCS to release her children and was told that she had to sign some document before that is done. It was her contention that the OCS who was known to them had in 2013 arrested the accused on an allegation of some debt owed to an old man. In cross-examination she stated that the deceased was thirty two (32) years old unmarried at the time of his death. On the material day they allowed him to sleep in their house because he was drunk. She stated that whatever the police recorded is not what she had told them and that they had washed the house before the police were called.

15. DW2 ERASTUS NJUGUNA MIRING'U the accused testified on oath and corroborated the testimony of **DW1** and confirmed that when the deceased went home he was bleeding and his right hand had been tied with a jacket. He had carried nothing and was not violent. The deceased talked with mother asking for food and there arose no confrontation between them. On 1/01/2015, he woke up at 6.00 a.m. and heard the deceased talk with **DW1**. He then went back to sleep until 8.00 a.m. when he woke up to find his sitting room dirty and smelling of human faeces with the deceased's jacket on the floor. He told **DW1** to wash the room but since she was angry he decided to do it himself and there everything including the jacket in the pit latrine. Between 9.00 a.m. – 10.00 a.m. one **Samuel Mumu** came to visit since he was an age mate and a friend to the deceased. He then strangled a chicken using a *panga* which was provided as exhibit. They were later on visited by **MERCY MBOGO (PW3)** whom they sat with until the deceased fell down from his house. He then reported the incidence to the village elder (**PW2**) who came and witnessed what had happened before they reported to the police station where the OCS told him that he had brought himself to the station and he will see what will happen to him next.

16. The police later on took away the body of the deceased and some items as exhibits when the police told the four of them that they were under arrest. At the police station he declined to sign a statement which was given to him but later on signed so that his wife may be released from custody. It was his evidence that the OCS had arrested him on 6th November 2013 and locked him for two days on an allegation that he had run away from custody. It was his evidence that he was on friendly terms with the deceased.

17. In cross-examination he confirmed that the deceased spent the night of 31st December 2013 in their house in which he was together with

his wife and younger son. He confirmed that there was blood stains and human faeces on the chair where the deceased had slept and that he is the one who cleaned the mess and threw the jacket of the deceased to the pit latrine. He confirmed that the deceased had two deep cuts on his head which might have been caused by the glass. He confirmed that according to his statement to the police the deceased came home armed with a *panga* waiting to harm him and that according to the statement of **DW1** there was a confrontation between him and the deceased.

SUBMISSIONS

18. It was submitted by Mr. Ratemo on behalf of the accused that the death of the deceased according to **Dr. Peter Ndegwa** was caused by a blunt object while the prosecution's case was that it was caused by a cut on the forehead. It was contended that whereas the accused has been charged with the event of the night of 31st December 2014, the prosecution evidence is that the deceased was alive on 1/01/2015 at 12.00 p.m. when he requested for water. It was stated that when the accused noted that the deceased had injuries on his wrist they offered to give him medical assistance but he declined. It was therefore submitted that the death was not caused by an act of omission on the part of the accused.

19. On malice aforethought it was submitted the accused had no reason to cause the death of his son as the evidence tendered was that they had cordial relationship including providing for him shelter in his compound despite the fact that he was an adult aged 32 years. It was submitted that the statement from **PW1, PW4, PW5** and the accused which were all retracted on account of being extracted from them by the authorities through force were therefore inadmissible for which the case of **CALEB NYANGAU MANYIZA v REPUBLIC [2005] eKLR** was submitted in support. It was therefore submitted that the prosecution had failed to prove its case and the accused should be acquitted under **Section 322** of the **Criminal Procedure Code**.

20. On behalf of the prosecution it was submitted by Mr. Naulikha that the matter was a family one and it was natural for misunderstandings and disputes to arise and having put up with the accused for 32 years, there was no justification to take his life. It was submitted that immediately after the commission of the offence the accused decided to hide the evidence and interfere with the case. It was submitted that there was no evidence of coercion to secure the statement from the accused and his family members as they did not dispute the content of the said statements, the accused should therefore be found guilty as charged.

ANALYSIS AND DETERMINATION

21. To sustain a conviction on a charge of murder under **Section 203** of the **Penal Code** the prosecution is required to prove beyond reasonable doubt the following elements of the offence:-

- a) *The fact and cause of death.*
- b) *That the death was caused by unlawful act of omission or commission on the part of the accused person.*
- c) *That it was committed with malice aforethought - mens rea on the part of the accused as defined in Section 206 of the Penal Code.*

22. The fact and cause of death of the deceased was not disputed throughout the trial. **PW1** the mother, **PW2** the village elder, **PW3** the aunt and a neighbour, **PW4** the brother, and **PW5** another brother of the deceased all confirmed that the same died having fallen from his house. The accused in his defence further confirmed that indeed the deceased died on the 1st of January 2015. **PW6 CORP. VIRGINIA WANJIKU** the then **OCS** of the area visited the homestead of the accused upon receiving a report of the death of the deceased on 2/01/2015 when the body had been taken away by the police from the scene on 1/01/2015 by **PW8 ACP JANE MUHIA**. The cause of death was proved through the evidence of **PW9 DR. PETER NDEGWA** who performed post-mortem examination and formed opinion that the cause of death was craniocerebral injuries due to blunt force trauma. It therefore follows that the fact and cause of death were proved beyond reasonable doubt.

23. The only dispute in this cause is whether the said death was caused by unlawful act on the part of the accused person. I must state for record purposes that this cause is very unfortunate. It is a case where a father had been accused of causing the death of his son and all the essential witnesses were family members of the deceased and the accused. During the course of the trial it was clear to the court that there was some conspiracy either to fix the accused by the police or to save him at all costs by the family. This being a criminal trial, there is no room for speculation and the court's decision must as in law required always be based on the evidence on record and not conjecture and speculations.

24. The prosecution theory as advanced by the police witnesses starting with **PW8 JANE MUHIA** who was commanding the police station who first went to the scene upon receiving the report from the accused and **PW2** and was directed by the accused to the place where the deceased was lying covered in a blanket outside his house, was that the deceased was killed by his father the accused on the night of 31/12/2014. This was followed by the fact that she followed the blood stains from where the body was to the house of the accused where she found a blanket duster with blood stains, on the floor and walls were bloods stains, the body of the deceased according to her evidence looked washed and oiled. It was her evidence that the accused had told her that the deceased came home drunk and armed with a *panga* forcing his way into the room where a struggle ensued between them and was disarmed. She recovered from the scene a brown shoe with blood stains, blanket duster, cushion covers, table clothes, sofa set cover and *panga* all which were blood stained.

25. It was therefore the prosecution theory that there was a confrontation between the accused and the deceased on the night of 31/12/2014 from which he sustained injuries and that the accused did not take the deceased to seek medical intervention thereby leading to his death. After the death or soon after the confrontation the accused cleaned the blood stains which came from the deceased's injuries.

26. The evidence tendered by all eye witnesses was that the deceased came home while drunk on the night of 31/12/2014, broke the window

glass of the house and cut himself, then got access into the house and was left sleeping until the following morning when they found the house in a mess. The deceased later on went into his house which was raised on timber and allegedly fell down therefrom on 1/01/2015 at about 12.00 and died as a result of the said fall. This was the evidence of **PW1, PW2, PW3, PW4, DW1** and **DW2**.

27. It is therefore clear that the prosecution case was wholly based upon circumstantial evidence as they did not produced any witness before the court who saw the accused kill the deceased. The law on circumstantial evidence in Kenya is now well settled as was stated in the following cases which I have reproduced in Nairobi High Court Criminal Case No. 25 of 2017, **ANNETTE ACHIENG v REPUBLIC:-**

(a) **JOAN CHEBICHII SAWE v REPUBLIC (2003) eKLR** where the Court of Appeal stated thus:-

“In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.

(b) **REPUBLIC v ELIZABETH ANYANGO OJWANG [2018] eKLR**

“In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances get snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubt. The court must be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions, see NAVANEETHA KRISHNAN v THE STATE BY INSPECTOR OF POLICE – SUPREME COURT OF INDIA, CRIMINAL APPEAL NO. 434 OF 2013.”

(c) **OMAR CHIMERA v REPUBLIC, Crim Appeal No. 56 of 1998** cited in **REPUBLIC v SKM [2017] eKLR** thus:-

“It is settled law that when a case rests entirely on circumstantial evidence such evidence must satisfy 3 tests. The circumstances from which the inference of guilt is sought to be established must be cogently and firmly established.

i. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused

ii. 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 no one else”

28. The circumstantial evidence against the accused as tendered through the prosecution witnesses are that there was blood trail from the house of the accused to the pit latrine, and to the house of the deceased. That there was blood stains found on a panga that was recovered from the house of the accused, that the sofa set covers and seat cushion found in the house of the accused had blood stains and finally that there was blood stains on the floor and walls of the house of the accused as well as blanket duster and basin found at the same place. It was further the prosecution case that the deceased had a deep cut on his head and hand with his body cleaned and oiled thereby confirming that the same was cleaned after he died.

29. I have contrasted this evidence against that of **PW9 DR. PETER NDEGWA** who stated that the cause of death was cerebral injuries due to blunt force trauma thereby breaking the link of the deceased having been killed as a result of injuries sustained through a cut with a panga. The prosecution theory is further weighed against the evidence of **PW7 ELIZABETH WAITHERA ONYIEGO** a government analyst who examined the blood stains from the brown shoe found near the body of the deceased, the chair clothe, blanket duster, blood swabs from the house of the accused, the house of the deceased, pit latrine, cushion covers, sofa set covers, panga and finger nails of the deceased and concluded that they were stained with blood of human origin and the DNA profile generated therefrom were of unknown human origin thereby creating a doubt on whether it was the blood of the deceased.

30. I have further looked at the evidence of **PW1, PW4, PW5, DW1** and **DW2** all family members of the accused as contrasted with the evidence of **PW6** and **PW8**. In cross-examination as regards how their statements were taken and having noted that what the witnesses stated in court was apparently different from what was allegedly contained in the said statements and no trial within trial having been conducted so as to determine the voluntariness of the said statement leading to the prosecution to abandon **PW1** as their witnesses, I find and hold that proper procedure for taking statements under inquiry, charge and caution was not followed and therefore those statements are of no evidential value as it is clear that there was a history of bad blood between the accused and the local police station as confirmed by both **PW6** and **PW8** and by the accused in his defence. On the authority of **CALEB NYANGAU MANYIZA v REPUBLIC [2005] eKLR** any alleged statement by the accused and prosecution witnesses related to him and the deceased are hereby excluded from the proceedings.

31. The prosecution’s evidence is further contradictory and disjointed. There was no evidence tendered before the court to prove the actual date of death of the deceased. There is evidence that the same was alive on the 1st January 2015 as at 1.00 p.m. There is further contradiction on the evidence of the prosecution as to what happened to the deceased. Whereas it was the evidence of **PW6** and **PW8** that there was a confrontation between the deceased and the accused for which he sustained injuries which resulted to his death, this evidence is contradicted by that of all the prosecution witnesses who were related to the accused and the deceased whose testimony was that the deceased sustained cut injuries to his hand when he broke the window glass to the house of the accused and that he died when he fell from his house which was on a raised timber platform. The chain on the circumstances leading to the death of the deceased was far from being complete.

32. Finally the chain of evidence which would have shed light as to what really happened to the deceased on the material night would have

been the evidence of the only witness who was not related to both the accused and the deceased who allegedly visited the deceased and spoke with him at length and who was never called by the prosecution, that is the evidence of one **Sammy** who was a friend of the deceased and who was never called by the prosecution to testify. I would therefore make adverse inference that this evidence would have been adverse to the prosecution case.

33. The prosecution further failed to prove any motive on the part of the accused to cause the death of the deceased. There was evidence from all the prosecution witnesses that there was no bad blood between the accused and the deceased which would have caused the same to cause his death. The accused's account is that the deceased was not confrontational and that he had taken all the steps to make his life comfortable including building for him a house despite the fact that he was thirty two (32) years old. The village elder **PW2** confirms that the accused was a loving father to all his children including the deceased.

34. Whereas there is a strong suspicion of the involvement of the accused in the death of the deceased and an attempt by his family to cover up, as there is a remarkable contradiction on their account as to what happened on the night of 31/12/2014 and the morning of 1/01/2015. In criminal matters the duty is always with the prosecution to prove its case beyond any reasonable doubt, the accused on the other hand is only expected to raise probable cause to cast doubt on the prosecution case and as was stated in the case of **SAWE v REPUBLIC [2003] KLR 364**, suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.

35. At the close of the defence case there remained a doubt as to the source of the blood stains found in both the house of the accused and the deceased, the cause of the cut found on the forehead and hands of the deceased and the role if any played by the accused. The accused in his defence and in cross-examination raised the issue of bad blood between him and the local police station leading to the possibility of the same being fixed by the police at the said station when he reported the death of his son. It was for the prosecution to prove beyond reasonable doubt that indeed the death of the deceased was caused by the accused with malice aforethought which they failed to so do.

36. Based on the material placed before me and whereas the deceased lost his life in the confines of the accused's home where he expected to find safety and security, I find that the circumstantial evidence tendered do not point to the guilt of the accused and therefore find that the prosecution has failed to establish its case against the accused person to the required degree - that is beyond reasonable doubt and accordingly find the same not guilty of murder. The accused to be set free forthwith unless otherwise lawfully held.

37. Since the dead tells no tales, it is upon the accused and his family to search their conscience as to whether the deceased has obtained justice as he awaits resurrection morning and it is for the local police to search their soul as to whether the matter was adequately investigated and whether the accused and his family interfered with evidence so as to defeat the cause of justice. In criminal matters the case must always be proved beyond reasonable doubt and the benefit of any doubt will always go to the accused, which I hereby do.

38. The State has right of appeal and, it is so ordered.

Dated, signed and delivered at Nairobi this 15th day of October, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Okeyo for the State

Mr. Macharia for Ratemo for the Accused

Accused present

Court assistant- Karwitha