



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 60 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MUTHUA KIMANI.....ACCUSED

JUDGMENT

1. Phillis Wanja Kimani (“Phillis”) is an elderly lady. She lives in Gathaite Village, Githobokoni Location within Gatundu North in Kiambu County. Tuesday, 16/09/2014 started like any other day for her: with her quotidian routine of unlatching her main door, taking the short walk to her outside kitchen and making tea. Her day would soon take a turn for the worse.

2. For the better part of a month or so, Phillis had been living with one of his three sons – Francis Ndua Kimani (“Deceased”). In the night, the Deceased would sleep on a sofa in Phillis’ house. Phillis clearly remembers the Deceased announcing that he was going to bed on the night of 15/09/2014. She also thought that she saw him on the sofa as she herself went to her bedroom. Before retiring to her bedroom, Phillis remembers latching the main door and checking everywhere to make sure they were safe. She then went to sleep.

3. Phillis woke up early in the morning. She unlatched the main door and went to the kitchen to make herself some tea. She noted that the Deceased was not on the sofa where she had left him the previous night. At first, she did not think much of it. She had her tea; and shared a cup with her daughter-in-law (Wanjiku) who had come to visit her.

4. By the time Phillis had finished her breakfast, it was getting a little bit late. She went to the main house to look around. There she found a sobering sight in one of the rarely-used rooms in the house: the body of her son, the Deceased, was hanging by a rope. The rope was sisal and it was secured to the rafters on the one end; the neck of the Deceased on the other. The Deceased’s one leg was barely above the ground. Phillis immediately called her daughter-in-law and instructed her to go call her husband (Phillis’ other son) to go to the scene. Thus started the investigations that culminated in the arraigning in Court of Phillis’ younger son – Joseph Muthua Kimani (“Accused Person”) – charged with the murder of his brother, the Deceased on the night of 16/09/2014, and contrary to section 203 of the Penal Code as read together with section 204 of the Penal Code.

5. This was Phillis’ testimony in the trial of the Accused Person. She testified as PW1. It was left to the other ten Prosecution witnesses to try and connect the Accused Person with the alleged murder of the Deceased.

6. Phillis’ daughter-in-law, Jane Wanjiku Gathukia, was the second one to testify. She confirmed that she went to Phillis’ house in the morning of 16/09/2014 and she found Phillis who was wondering where the Deceased had gone without informing her. Later on, after she went to the shamba to get fodder for her cows she got a call informing her that Phillis was screaming at her home. She rushed to the home only to discover what had happened.

7. Wanjiku’s husband, John Gathukia Kimani, also received a call from Wanjiku that morning informing him about the death. He rushed home only to find the Deceased hanging on a rope in their mother’s house. He called the Assistant Chief, Njiraini Kiarie who came with some Policemen. Investigations started from that point. John testified as PW3 while Assistant Chief Kiarie was PW4.

8. Naomi Wanjiru Kimani is a sister to the Deceased and the Accused Person as well. She, too, received the dreaded call in the morning of 16/09/2014 while in her home in Wangige. She immediately travelled home where she was met by the same sad sight: the Deceased hanging by a sisal rope. She testified as PW5.

9. Mary Wambui was the estranged wife of the Deceased. In the witness dock, she admitted that they separated but that they were still friendly; that they still talked and did projects together. She too received a call at around 11:00am in the morning of 16/09/2014 informing her about the death. She then travelled home and participated in funeral arrangements. So did her daughter Phyllis Wanja Wambui. Mary testified as PW8 while Phyllis testified as PW9.

10. None of those who testified saw the Accused Person committing the murder of the Deceased. So, how did the Prosecution hope to link

the Accused Person to the murder?

11. The first step was the evidence of Dr. Eunice Mugwero, the Pathologist who performed autopsy on the body of the Deceased. She performed the autopsy on 19/09/2014. She testified that she found the body in a blood-stained shirt and muddy trousers. One upper tooth was missing and several others were mobile or loose. Dr. Mugwero further testified that the body had a sisal rope around the neck and a ligature mark around the neck running horizontally with bruises around it. It also had bruises on the face and neck. The doctor noted petechial hemorrhages in the upper airways, lungs, cardio-vascular system and digestive system. The scalp also had hemorrhage although there was no skull fracture and the brain was intact. The doctor concluded that the cause of death was asphyxia caused by strangulation. She was categorical that the bruises were of recent origin. Further, the doctor testified that the ligature marks and bruises showed that the Deceased was strangled using the rope when he was in a sleeping position or in a position where he would have been unable to defend himself.

12. In other words, the results of the post-mortem examination ruled out suicide: the Deceased was killed by someone. The only question which remained who the culprit was.

13. Naomi (PW5) was the first on the stand to verbalize a hint of a theory that it was the Accused Person who had done it. Why? Her words: *“The Accused never attended any funeral meeting; nor did he attend the burial of his brother [Deceased]...”*

14. Mary Wambui (PW8) moved beyond hints and innuendo. She was persuaded that it was the Accused Person and one, Kimani Wanjeri, who killed her husband. She testified thus:

My husband had a big disagreement with the Accused and Kimani Wanjeri. A few months before, my mother-in-law had gone to subdivide the land between my husband and his two brothers (including Accused).

Joseph (Accused) wanted his sister (Ruth Wanjeri) to be given a piece of land. But they were told that their shares of all the sisters is in another parcel of land.

That evening the Accused, Kimani Wanjeri and the sister attacked my husband and assaulted him grievously. They did this in front of my mother-in-law. He reported to the Police and they were charged before a Court in Gatundu. They had threatened to kill my husband. The case was never completed. He died before the case.

15. So Mary supplied the motive for the murder: it was the disagreement over the distribution of the inheritance from their father that had actuated the killing. Indeed, Mary testified, the Accused Person had already previously acted on his ill-will towards the Deceased.

16. Mary's daughter, Phyllis (PW9), supplied further content to the theory. She testified that on 21/09/2014 she and her sister were in Gatundu at the grandmother's place to arrange for the funeral of their father. Phyllis testified that at around 7:00am, she was walking on a path near her grandmother's compound when she saw the Accused Person who was with Kimani Wanjeri. Phyllis testified that when they got near where the Accused Person and Kimani Wanjeri were, the two burst out laughing. Phyllis claims that she heard the Accused Person telling Kimani Wanjeri that they had "finished" their mission. Phyllis was convinced that the two of them were mocking them because their father had died. She was also convinced that the "mission" they were talking about was to kill her father.

17. It was, however, left to Anastasia Waithera to attempt make the physical connection between the Accused Person and the murder. Anastasia testified as PW7. She is a farmer but she also runs a small shop in the village which she opens in the evenings.

18. Anastasia vividly recalled the evening of 15/09/2014. She opened her shop at around 3:30pm. A young man known to her went to the shop. He was interested in buying a rope; a sisal rope. Anastasia gave the young man the price: Kshs. 30/-. The young man had only Kshs. 20/-. He took the rope and promised to come pay the remaining Kshs. 10/-. He never came back. That young man was Kimani Wanjeri – the nephew to the Deceased; the one who Mary (PW8) claimed had attacked the Deceased together with the Accused Person.

19. The Investigating Officer, Corporal Evans Kipter, who testified as PW11, tried to connect the rope Kimani Wanjeri bought with the murder and with the Accused Person. Corporal Kipter told the Court that he bought another rope from Anastasia for comparison purposes. He produced both ropes in Court as exhibits. His conclusion was that Kimani Wanjeri bought the rope to use in committing the murder.

20. If so, where is the nexus with the Accused Person? First, the motive discussed above links the Accused Person with Kimani Wanjeri. Second, Corporal Kipter explained that after he had concluded that a homicide had been committed, both the Accused Person and Kimani Wanjeri vanished from the area. The Accused Person was only arrested when he allegedly went to withdraw money from a bank in Gatundu and the Area Chief tipped off the Police. The Police immediately arrested the Accused Person. He then led them to what Corporal Kipter described as their "hide-out" in Ndarasha near Kiai Forest – about 50 kms away from his home. The Accused Person had, allegedly, told the Police that Kimani Wanjeri was there. However, on getting there, Kimani Wanjeri allegedly noticed the Police vehicle and ran away. He is still at large.

21. The critical question is whether the Prosecution has proved beyond reasonable doubt that the Accused Person murdered the Deceased. To do so, the Prosecution is required to tender proof beyond reasonable doubt 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.

22. On the other hand, malice aforethought is established, under section 206 of the Penal Code, 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; or
- 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; or
- 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.

23. There is no question from the evidence tendered at the trial that the Deceased, indeed, died. There are questions, however, about what killed him. In his sworn statement, the Accused Person insisted that the Deceased committed suicide and that the present charges are a frame-up job by the Deceased's wife to revenge because the Accused Person refused to reconcile her with the Deceased.

24. The question that remains is whether the Prosecution has established sufficient nexus to warrant a conclusion that the Accused Person committed the murder either singly or jointly with other people. I have explained the Prosecution theory above. It is simply that the Accused Person was fueled by the grudge against his brother due to the land dispute; and that he conspired with Kimani Wanjeri to purchase the sisal rope from Anastasia. They then somewhat gained entry to the Accused Person's mother's main house at night while the Deceased was asleep and strangled him using a rope. Finally, the theory goes, they staged a "suicide" to dupe the family and avoid suspicion.

25. 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.

26. 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.*

27. Earlier on, *Kipkeriing 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.*

28. 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.

29. 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 not persuaded that this is the case here. I say so for at least three reasons:

- a. First, in the case at hand, there are no cogent facts from which an inference of guilt can be drawn. Other than the motive, nothing else drives the narrative. There is no evidence whatsoever that the Accused Person was at the scene of the murder. There is also no evidence that the Accused Person had opportunity to commit the murder.
- b. Second, the only physical evidence tendered to link the Accused Person with the offence, at best, links Kimani Wanjeri only. I am referring to the evidence of the rope which was allegedly bought from Anastasia. Even accepting that evidence as credible, which I do because I found Anastasia to be a straightforward and truth-telling witness, that evidence does not link the Accused Person with any plot to kill his brother. It is not enough that the Accused Person was jointly charged with Kimani Wanjeri in a different case of assaulting the Deceased. That is not sufficient link to conclude that Kimani Wanjeri, in purchasing the rope, was acting in a joint enterprise with the Accused Person.
- c. Thirdly, the post-incident conduct of the Accused Person, while raising eye-brows, does not "unerringly" point to the guilt of the

Accused Person as the law demands. Even if it is true that the Accused Person did not participate in funeral arrangements or never attended the burial of the Deceased, in the circumstances of the case, that would not be enough to form a tell-tale sign that he committed murder. This is also true about his disappearance from home even if true. The truth of the matter is that the family was deeply divided and there were deep suspicions that the Accused Person had killed his brother. Not showing up for the burial of a brother you are accused of killing is not an out-of-this world response. In other words, the circumstantial facts the Prosecution relies on could be compatible with the innocence of the Accused Person.

30. In the end, what we have in this case are suspicions; very strong suspicions; grave suspicions backed up by a motive; a very compelling motive that it is the Accused Person who unlawfully killed the Deceased. However, as the Court of Appeal held in *Sawe v R [2003] KLR 364* “suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

31. In the present case, after due analysis, I find that the evidence tendered by the Prosecution is not sufficient to prove the offence of murder beyond reasonable doubt. Consequently, I find that the Accused Person is not guilty of the offence of murder of Francis Ndua Kimani. I, accordingly, acquit him under section 322(1) of the Criminal Procedure Code. The Accused Person shall be set at liberty unless otherwise lawfully held in custody.

32. Orders accordingly.

Delivered at Kiambu this 22nd day of November, 2018.

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JOEL NGUGI

JUDGE