



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 6 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JOHN MAINA NJIIRI.....ACCUSED

JUDGEMENT

Introduction

John Maina Njiiri, the accused, is charged with the murder of Allan Ngure Munyi, the deceased, contrary to section 203 as read with section 204 of the Penal Code. It is alleged that this offence took place on 7th January 2012 at Njiiri Estate within Njiru District in Nairobi County. It alleged that the accused committed this offence jointly with others not before the court. The accused denied committing this offence.

The accused was initially charged jointly with one Solomon Thuku Kungu. The latter is at large after he jumped bail. By the time Solomon Thuku absconded, the prosecution had presented six witnesses to court and their evidence had been taken by Hon. Lady Justice Florence Muchemi.

I took over the conduct of these proceedings on 13th November 2014. Shortly thereafter on 23rd March 2015 when the proceedings were scheduled to resume, Solomon Thuku Kungu absconded. A warrant of arrest was issued and summons to show cause to surety issued. The warrant was never executed and to avoid further delay the prosecution applied to withdraw charges against Solomon Thuku Kungu and to amend the charge sheet to enable it proceed with the prosecution against the accused now before the court. This was allowed and hearing resumed from where it had stopped after taking directions to that effect.

Prosecution case

James Kiiru Mwangi, PW1, (James) owned motor vehicle number KBG 134K Toyota Pick-up. It was used for transport business. On 6th January 2012, this vehicle was being driven by the deceased. James informed the court that his vehicles used to be parked in one place after working hours and that all of them had been fitted with car track devices. He said he used to allow his drivers to take vehicles home with them if they had some transport business to attend to early the following day. James remained in constant communication with his drivers and kept track of the whereabouts of his vehicles at all times. On 6th January 2012 he had allowed the deceased to take the vehicle in question home with him because the deceased was required to travel to Mangu in the morning of the following day to transport chicken for mama Mercy, PW10.

Around 10.00pm the same day, the deceased called James and told him that he was called for a job of rescuing the lorry of one Irungu that was ferrying tar and that had broken down around Njiru area. James told the deceased not to tow the lorry but to assist only in ferrying the tar. James did not know who Irungu was but later met him in the course of investigations in this case.

In the morning of 7th January 2012 at about 1.52 am, the car track system showed that the vehicle was on Nakuru-Malaba Road near Rongai junction. In the same morning, James found a text message in his phone that the car track system had been disconnected. He suspected interference. He called the deceased but could not reach him on his Safaricom and Airtel lines. At 6.00 am he called the tracking company to assist him in tracing the vehicle. It was traced at Total Market on Nakuru-Eldoret Road. Through the tracking system, James noted from the motor vehicle movement history that it had moved through Kangundo Road, stopped at St. Francis near Ruai, went to Mwiki-Kasarani Road through the bypass and joined Nakuru-Nairobi Road.

James learned later that morning that the body of the deceased had been found at Njiru area. He went to scene and saw the body which had injuries on the left side of the head, bruises on the hand and blood-stained clothes. The body was retrieved and taken to Kenyatta University Mortuary where it was examined by Dr. Oduor Johansen, PW16, on 9th January 2012. It was identified by Ann Wairimu Githinju, PW8, and Mary Wanjiku, PW5, with PC Omwoyo, PW12, in attendance.

With the help of the Police in Nakuru the vehicle was traced at Salgaa Shopping Centre along Nakuru-Eldoret Road. The accused and Solomon Thuku Kungu were arrested at the same center and later transferred to Kayole Police Station in Nairobi where they were charged with this offence.

Further evidence by CPL Edward Kunja Impui, PW1, who was at the time stationed at Nakuru Flying Squad, is that he and one PC Kago were assigned duties to go to Salgaa Centre to follow up on a motor vehicle allegedly stolen from Nairobi. This was on 7th January 2012. He said that on arrival at Salgaa they spotted the motor vehicle No. KBG 134K a Toyota pick-up parked in an open place. The time was about 2.00 pm. The two officers laid ambush to see who would approach the vehicle. Around 7.00pm they saw a man approach the car and try to open the driver's door. It was locked and could not open. They arrested the man identified as Solomon Thuku Kungu. He was interrogated and mentioned that there were other people involved. The accused was identified as the other person and was also arrested at Travellers' Pub within Salgaa Centre.

Evidence discloses that the accused and Solomon Thuku Kungu arrived in Salgaa on 7th January 2012 at 1.00am. They met Livingstone Kipkoech Kosgei, PW2, who was a watchman at Highway Lodge at Salgaa Centre. PW2 helped them to look for a buyer of 20 litres of diesel from the same vehicle. PW2 found David Kikemoi Kirui, PW3. PW3 could not however manage to siphon diesel from the pick-up because the hose pipe he brought could not fit into the fuel tank. PW2 told the court that the accused and Solomon were still in Salgaa the following day when he resumed duty at 4.00pm. He said that at about 8.00 pm they two were arrested by the police.

Defence case

The accused person was put to his defence. He testified without taking oath and was the only defence witness. He gave a long defence. The relevant part of his evidence is that on 6th January 2012 at 7.00 pm one Thuku, a friend of his called him and asked him to accompany him to Eldoret to pick some goods. They met at Kariombangi North at 9.25am. The accused was to drive because he knew the route better. They agreed that the accused would be paid Kshs 5000. They arrived in Nakuru at 12.30am and at Salgaa Centre 1.00 am. The accused testified that Thuku told him that they would not be proceeding to Eldoret since the goods they were going to pick had been loaded on a lorry owned by Rongai Transporters and that they should instead go to Salgaa where the offices of Rongai Transporters are located. At Salgaa a watchman showed them where to park and helped them find a buyer of diesel from the vehicle they were driving. They agreed to sell 20 litres of diesel at Kshs 2,200. He said that he was given Kshs1,000 to get accommodation and he left Thuku drinking and went to sleep.

He further testified that in the morning Thuku was not reachable most of the times he called him; that they met later that morning of 7th January 2012 and went to where the car was parked; that he tried to switch the engine on but was not able to; that they looked for a mechanic but were told a mechanic could only be found in Nakuru and Thuku decided to go for the mechanic leaving the accused in Travellers' Lodge drinking. He said he was arrested around 7.25pm after one Mugo a driver at Burma market identified him. He said he was asked about Allan Ngure and whether he knew who had killed Ngure. He said he was taken to a vehicle where he found Thuku having been arrested and handcuffed.

The accused told the court that he knew Ngure and that he had worked with him at Burma Market for about 6 years; that he told the police he did not know who had killed him; that they were taken to Central Police Station in Nakuru and placed in cells and transferred to Kayole Police Station where they were charged. He said he had been given work by Thuku and he is the only one who can explain about Ngure and what happened to him.

Submissions

At the close of the case for the defence, parties were given up to 20th December 2016 to put in their submissions. The prosecution has not filed submissions to date (7th January 2017) at the time of writing this judgement. I have read the submissions by the defence. In summary, the accused, through his counsels, Mutitu, Thiong'o & Co. Advocates, submitted that the prosecution case is based on circumstantial evidence since there is no direct evidence. The defence has cited the following cases in support of their arguments: **Republic v. Michael Muriuki Munyuri [2014] eKLR**; **Sawe v. Republic [2003] KLR 364**; and **Musili Tulo v. Republic [2014] eKLR**.

The legal principles in the above cited cases in respect of circumstantial evidence are that the burden to prove circumstantial evidence lies with the prosecution and does not shift and that the law is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy the following tests:

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) 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.
- (iv) Before drawing the inference of accused's guilty from circumstantial evidence, it is necessary to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Counsel submitted that the prosecution has failed to prove circumstantial evidence against the accused and that suspicion alone, however strong can never be relied on to sustain a conviction in a criminal case.

It was further submitted that the prosecution has failed to prove motive or preparation to commit murder and that malice aforethought has not been proved; that motive is an important element in this case because the case rests purely on circumstantial evidence. Counsel urged court to acquit the accused in line with section 111(1) of the Evidence Act.

Analysis and determination

From the record of proceedings, there is no dispute that Allan Ngure Munyi the deceased in this case died. There is ample evidence in support of this fact. His remains were found in Njiru area within Nairobi with fatal injuries. PW16 the pathologist confirmed the death of the deceased. From his evidence and the post mortem report produced as exhibit 5, the deceased had the following injuries:

- (i) Extensive bruise on the forehead, right side measuring 10 x 8 cm.
- (ii) Laceration on the right earlobe.
- (iii) Horizontal laceration behind left ear, 2 cm long.
- (iv) Horizontal laceration on occipital scalp.
- (v) Multiple facial and scalp bruises.
- (vi) Ligature bruise across the neck below the thyroid cartilage.
- (vii) Multiple bruises on both arms (defence injuries).
- (viii) Bruise on the right loin measuring 10 x 12 cm.
- (ix) Scalp hematoma on frontal region.
- (x) Extensive acute subdural hematoma.

After the examination the doctor formed the opinion that the deceased had died due to head injury due to blunt trauma as well as ligature strangulation.

From this medical evidence and the photos showing the condition of the body of the deceased, it is factual that he died as a result of an unlawful act in the hands of someone who had malice aforethought. Those injuries bear testimony to the fact that whoever inflicted them had knowledge that they would occasion death or grievous harm to the deceased. It is my finding therefore that the prosecution has proved the fact of the unlawful death of the deceased and the cause of that death beyond reasonable doubt.

The second issue is whether the accused in court caused the death of the deceased. As submitted by the defence, there is no direct evidence linking the accused to the death of the deceased. The accused was arrested and charged with this offence because he was implicated in the recovery of KGB 134K. There is sufficient evidence to show that the accused was connected with the recovery of the vehicle. The evidence from PW1 shows that the accused was found with the ignition keys to this vehicle in his pocket. This is not disputed by the defence. The accused actually admits to having driven that vehicle after being contracted by Solomon Thuku Kungu, who is at large, to do so.

I note that neither the prosecution nor the defence addressed the issue of the doctrine of recent possession. The Court of Appeal in **Omar Haribae & Another v. Republic in Criminal Appeal No. 256 of 2011** reported in [2014] eKLR had this to say on this doctrine:

“This doctrine is buttressed further by the provisions of section 119 of the Evidence Act. The presumption is however a rebuttable one but the burden shifts to the accused person as soon as all the elements are proved to properly invoke the doctrine. To invoke the doctrine, the State must prove beyond reasonable doubt each of the following four elements:-

- (i) That the property was stolen,**
- (ii) That the stolen property was found in the exclusive, physical or constructive possession of the Accused,**
- (iii) That the property was positively identified as the property of the complainant; and**
- (iv) That the possession was sufficiently recent after the robbery.**

As to what constitutes “recent” possession is a question of fact depending on the

circumstances of each case including the kind of property, the amount or volume thereof the ease or difficulty with which the stolen property may be assimilated into legitimate trade channels, the property's character, and so forth.

In this case, it is my considered view that all the four elements above have been proved. In this case, the burden of proof shifts from the prosecution to the accused person to explain how he came into possession of the vehicle. The doctrine is a rebuttal presumption of facts. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do then an inference is drawn that he either stole or was a guilty receiver.

In this matter, the presumption is that since the accused was found in possession of the keys to the motor vehicle No. KBG 134K, he was in possession of the vehicle. This vehicle was stolen from the deceased and the deceased killed probably in the cause of that theft and his body dumped at Njiru before the vehicle was driven to Salgaa. The accused and others not in court must therefore have killed the deceased in the cause of that robbery. The accused must under the law rebut that presumption and if he fails to do so then the inference is drawn that he is either took part in stealing the vehicle and killing the deceased or was a guilty receiver and must know how the deceased was killed.

The accused has explained how he was called by Thuku and asked to drive with Thuku to Eldoret to pick certain goods, how on arrival in Salgaa they did not proceed to Eldoret and how they were arrested in Salgaa. His evidence is corroborated by prosecution evidence especially that of PW1 on how the two were arrested and by PW2 and PW3 on how they parked at Salgaa and looked for someone to buy fuel from them. There is also corroboration that Thuku was arrested before the accused.

In my considered view therefore the accused has provided ample evidence in rebuttal to the doctrine of recent possession by explaining how he came to be involved in the vehicle which the deceased had been driving before he was killed and his body dumped at Njiru.

As stated by the defence, the prosecution case is anchored on circumstantial evidence since there is no direct evidence linking the accused with this offence. There is also the issue of recent possession which I have addressed above. Circumstantial evidence has been addressed in numerous decisions including the authorities cited by the defence. In **Sawe v. Republic** (supra), the Court of Appeal held that:

- 1. In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt.**
- 2. Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on.**
- 3. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.**

In the **Michael Muriuki Munyuri case** cited above, the High Court cited with approval the Court of Appeal decision in **Abanga alias Onyango v. Republic Criminal Appeal No. 32 of 1990 (UR)** in which the Court set out the principles applicable in determining whether circumstantial evidence is sufficient to sustain a conviction. These principles are as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused, (iii) 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 accused and none else.”

The circumstances in this case are that the deceased was the driver of motor vehicle registration number KBG 134K belonging to James Kiiru Mwangi (PW6). The vehicle was dealing with transportation of goods on hire. The deceased did not go to pick chicken for Mercy Wanjiru Ngugi (PW10) at Mangu on 7th January 2012 as planned. The vehicle was traced at Salgaa Centre on Nakuru/Eldoret Road on 7th January 2012. The accused was found with the ignition keys of this vehicle in his pocket. He was arrested alongside Solomon Thuku Kungu. The body of the deceased was recovered at Njiru on 7th January 2012.

I have considered these circumstances. I have also considered the doctrine of recent possession and the defence of the accused person. The circumstances of this case, considered on their own without taking into account the defence of the accused in rebuttal to the doctrine of recent possession seems to satisfy the principles of circumstantial evidence set out above. However, the accused has adduced evidence in rebuttal of the hypothesis that he could have been involved in the kidnap of the deceased and his eventual death. This evidence in rebuttal, in my view, provides other co-existing circumstances which weakens or destroys the inference of guilt on the part of the accused. This evidence in rebuttal also breaks the chain of circumstances from which an inference of guilt should be drawn.

The burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which a person is charged lies on that person by dint of Section 111 (1) of the Evidence Act. The second proviso to this section reads as follows:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

In my view the accused has successfully raised the necessary doubt in my mind to persuade me to find and hold that probably he was not involved in the death of the deceased and that he probably was an innocent driver hired by Solomon Thuku Kungu to drive vehicle Registration number KBG 134K. He has offered a good defence and in line with the above proviso I am persuaded to find, which I hereby do, that the accused is not guilty of the offence of murder. He shall benefit from the doubt created in this case. Consequently, I find that the prosecution has failed to prove the murder charge against the accused person beyond reasonable doubt. The law dictates that where there is no proof as required the accused shall be acquitted. I hereby proceed to so acquit John Maina Njiiri, the accused before me, of the offence of murder. He shall be free to go home to enjoy his liberty unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 25th of January 2017.

S. N. Mutuku

Judge