



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CRIMINAL CASE NO. 5 OF 2015

REPUBLICPROSECUTOR

V E R S U S

DAVID MARA KARANJA..... ACCUSED

JUDGMENT

1. The accused **DAVID MARA KARANJA** is facing one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the offence are:

“On the 4th day of January, 2015 at Kimende in Lari within Kiambu County murdered HANNAH WAIRIMU GICHUKI.”

2. The prosecution called ten witnesses. It is the prosecution case that the accused and deceased were first cousins by virtue of their fathers being brothers. It is also the prosecution case that in spite of the close relationship the two were also lovers. The deceased was working for PW1 and 2 as house help but also sold at their shop not far from their house she had worked for them for five years.

3. It is the prosecution case that 2 days before the incident, on 2nd January, 2015 the accused called PW1 on phone asking to meet and discuss something with him. The two agreed that accused would go to PW1's home to discuss the matter. After all the accused went to the home of PW1 and 2 to visit the deceased quite often.

4. It was PW1's evidence that that evening the accused visited PW1's home in the presence of PW2 the accused told PW1 that he had noted that he spoke with the deceased on phone quite often. PW1 informed the accused that the calls he made to the deceased were purely official and related to work she did for him.

5. It is the prosecution case that one day before the incident the accused called PW3, a younger sister of the deceased. The accused told her to call the deceased and tell her to refund the 20,000/= he had given to her as a loan. PW3 stated that the accused asked him to ask the deceased to deliver the money to PW3's house where he would collect it that evening.

6. At 5p.m. the accused went to PW3's house where deceased and PW3 were waiting. The deceased then gave the accused 20,000/= which PW3 in turn gave to the accused. It was the prosecution case that after pocketing the money, the accused told the deceased in PW3's presence **“continue with your pride”**. PW3 stated that the accused also told the deceased that from that day he had broken their relationship.

7. PW3 stated that neither accused nor deceased explained to her anything. PW3 stated that she was

aware the two had been friends for 10 years since 1995. PW3 stated that the deceased in response told the accused that she did not want a husband and she could not be married by someone's husband. She said that when she got a husband it will be well with her. She said that soon after making that statement, the deceased ran away leaving PW3 with the accused.

8. The evidence of PW4 was that at 6.30 a.m. she was in her house which shared a back wall with PW1 and 2's back wall. She said that she heard screams and a woman saying "*uuuiiii Mbute Mbute he intends to kill me.*"

PW4 stated that when the screams increased she decided to go and check. She therefore went and knocked on PW1 and 2's gate. PW2 opened for her and she entered inside. A huge crowd had gathered at PW2's gate. When PW4 went to the back, she found the deceased lying on the ground bleeding profusely and with a knife sticking from her neck.

9. PW2 who opened for PW4 testified that she saw the accused on the roof of a toilet near their gate. She saw the accused jump outside to the ground. PW2 said she knew accused since her childhood. She said that the accused had told her that he was a lover of the deceased. PW2 stated that she heard the accused confronting her husband about an affair between him and the deceased. PW3 said she did not know how their discussion ended.

10. The prosecution case is that on 5th January 2015, at 10 a.m. PW6 received a call from the Assistant Chief informing him that the accused was back in his house at that time. PW6 proceeded to accused house. He said that on reaching the gate the accused started running away with a rope. PW6 stated that the accused climbed a tree and having himself with the rope. PW6 stated a person nearly climbed the tree and cut the rope rescuing the accused. The rope was an exhibit. The accused was arrested and eventually charged with this offence.

11. PW7 took photographs at the scene of the murder. The bulk of the pictures were of several stab injuries on the upper part of the body. Photos 32, 33 and 34 were of blood stains on the roof of a toilet inside PW1 and 2's home, near the gate. Photos 30 and 31 were photos of foot prints on the perimeter wall on PW1 & 2's compound. Photos 35 and 36 were mud food print on a tree few meters from PW1 and 2's wall.

12. PW9 Dr. Ndegwa who carried out post-mortem examination on the body of the deceased stated that the body had 8 stab wounds on left neck measuring between 2cm to 3cm long, 2cms wide and 10 cm deep. These were four penetrating stab wounds below the clerical, three penetrating stab wounds on the shoulder. The cause of death was extranguation due to multiple penetrating stab wounds. PW9 testified that he removed a knife from the neck of the deceased.

13. The accused on his part gave a sworn defence. He called no other witness. It was the defence case that it was the deceased who called him on 3rd January, 2015 and asked to meet him in her sister's place. He said they met at PW3's house where they had lunch and juice and also engaged in amicable talk. The accused stated that the deceased then gave PW3 20,000/= to give to him which she did. The deceased then hugged him and left after receiving a call which she told him and PW3 was from PW1.

14. The accused stated that on the next day, which was a Sunday he never left his home. The accused said that on Monday he was at home when the Headman found him and asked for a ride in his motor bike. When he told him that he no longer had a motor bike, the Headman asked him to escort him to the road. That as he walked the Headman to the road they met police officer Munanda in company of 2 AP officers and five neighbours. Police officer Munanda told him that he was required at the police station.

15. Before reaching the police station Munanda informed him that the deceased was dead and that it was said he had quarreled with the deceased which he denied. He was placed in cells and eventually charged with this case.

16. Ms. Wafula prosecuted this case on behalf of the State while Mrs. Omungala defended the accused.

17. Mrs. Omungala for the defence submitted that no evidence was adduced linking the accused to the deceased death. Counsel urged that the prosecution was relying on circumstantial evidence. The defence counsel cited the case of **John Njenga Kimani vs. Republic** for the proposition that the case was not proved to the required standard. Counsel also cited **Ramanlal Bhat vs. Republic** for the proposition that the onus was on the prosecution to prove its case against the accused beyond any reasonable doubt.

18. Mrs. Omungala submitted that there were cracks on the prosecution case in that PW1 and 2 never heard screams by the deceased made within their compound. That the screams were heard by PW4 who testified that upon going to the scene she did not see anyone else there except the deceased and PW2.

19. Mrs. Omungala learned defence counsel urged that when PW10 visited the scene of murder after the incident no names of culprits or suspects were given to him there. Counsel urged that the murder weapon was not analyzed which was necessary. Counsel also urged that the evidence of PW6 that accused attempted to commit suicide required corroboration which was missing.

20. Counsel urged that the evidence of the prosecution was inconsistent and cited **Philomon Kiplangat Rono vs. Republic** for the proposition that inconsistent evidence cast a wide shadow on the prosecution case.

21. Counsel relied on a Daily Nation Newspaper daily of July 6th 2016 which carried a story of PW1's death after a case of abduction and the innuendo that his wife was suspected to have been behind his murder. Also attached was a funeral program and eulogy for PW1.

22. Ms. Wafula, learned Prosecution Counsel urged that the prosecution had adduced evidence which placed the accused at the scene of murder on the day of the incident. Counsel urged that the accused and deceased had a love affair for a long time. Counsel urged that the investigating officer had proved that when he went to arrest the accused, he attempted to commit suicide and the rope had to be cut. Counsel urged that such conduct was that of a guilty mind.

23. Regarding the newspaper story and funeral program of PW1 implicating PW2's involvement in his death Ms Wafula urged that the story was speculation and that no evidence was rendered to prove those facts.

24. I carefully considered entire evidence by the prosecution and accused sworn defence. I also considered submissions by both counsels in this case. Certain facts are not in dispute. It is not in dispute that the accused and deceased had a long standing love relationship and that they were first class cousins. There is no dispute that the deceased worked for PW1 and 2 both at home and in their shop within the shopping centre not far from the home.

25. The issues for determination is whether the prosecution had adduced sufficient evidence to establish that the accused caused the death of the deceased; whether the prosecution has established motive and malice aforethought against the accused; and, whether accused defence is plausible and reasonable.

26. Regarding whether the prosecution adduced sufficient evidence to establish the case against the accused, I have outlined the prosecution case in a sequential order in this judgment.

27. The prosecution is relying on circumstantial evidence. There was no eye witness of the attack on the deceased. However, the evidence by PW2 shows that when PW4 knocked on her gate at 6.30 a.m. on the material day. It is PW2 who opened the gate for her.

28. Mrs. Omung'ala took a swipe at the prosecution case urging it had several cracks. According to the learned defence counsel one of those cracks was the fact PW4 heard the screams by the deceased from her house while PW1 and 2 did not hear anything and yet the deceased was screaming within their compound.

29. I considered that PW4 was outside her house washing clothes when she heard the deceased

screaming. PW1 and 2 were sleeping inside their house at the time. Failure to hear screams outside is easily explainable by fact the two were sound asleep at the time. PW4 on the other hand was outside across the wall to where deceased was.

30. Mrs. Omungala raised issue with fact that although PW4 heard the screams, she did not see the accused.

31. Only PW2 said that she saw the accused on the roof of their external toilet before he jumped down outside their home compound. PW4 had just entered the compound. Her evidence was that she had heard the screams at the back of PW1 and 2's house and the moment the gate was opened, she ran directly to the back.

32. Given the evidence of PW4, it is clear that PW4 was distracted by the screams for help by the deceased who was calling PW1 saying the attacker's intention was to murder her. Indeed when PW4 reached where the deceased was, she started screaming due to what she saw.

33. It is trite law that inconsistencies in evidence is expected so long as they are inconsequential to the conviction. This was the holding in the case of **Thomas Kitsao alias Katiba v Republic MLD CA Criminal Appeal No. 123 of 2014 [2015] eKLR** where the Court of Appeal observed that;

“We shall promptly dispose of the question of contradictions and inconsistencies in the prosecution evidence. It is true that as regards the confessions there are slight variations from the account of one witness to the other. But we must ask ourselves whether these are normal variations that would be expected when different human beings recollect an event or incident or whether they are of such a nature as to betray a cooked up or contrived case? This Court has stated severally that the mere fact that there are some variations in evidence does not ipso facto prove that the evidence is false or unreliable (See Willis Ochieng Odero v Republic, KSM CR. APP. NO. 80 OF 2004). Indeed variations must be expected in evidence that is true. It is said that sometimes evidence without the slightest variation may be a good indicator of coached witnesses.”

34. Regarding evidence of the investigating officer that no names were mentioned to him when he visited the scene after the murder, it is true PW10 testified that no names of suspects were given to him at the scene.

35. The only person who said she saw the deceased leaving the scene was PW2. According to her evidence, upon seeing and learning of the deceased death she went into shock and confusion and so entered her house and did not leave again. Considering the deceased was her employee a couple of years and considering she was murdered in her home one can understand the reaction and her decision not to want to talk to anyone.

36. I noted that PW10 the investigating officer said the owners of the house told him they did not see the murderer. In the context of the fact there was no eye witness of the attack that statement was accurate.

37. The case of **Philomon Kiplangat Rono**, supra, cited by the defence is good law. However, I find that the faults the defence referred to as cracks and inconsistency in the prosecution case were in fact variations in evidence. Variations which I find did not go to the foundations of the prosecution case. Variations were not material and consequently did not affect the veracity of the prosecution case.

38. Regarding failure to analyse the murder weapon, I found the issue as an afterthought PW7 and 10 who photographed and investigated the case were not asked about it. There is no doubt that the knife was the murder weapon and the purpose of having it analyzed was not demonstrated to be necessary.

39. The evidence against the accused was circumstantial. The way to test circumstantial evidence was laid down in **ABANGA alias ONYANGO V. REP C.A. No.32 of 1990(UR)** thus:

“It is settled law that when a case rest 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 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”

40. The prosecution has established that the accused had a motive to commit the offence. Two days to the incident the accused questioned PW1 about the accused suspicion of an affair between deceased and PW1 due to constant phone communication.

41. The prosecution also established a fall out between the accused and the deceased one day before the incident. The prosecution adduced evidence to show that the accused demanded a refund of a loan he had given the deceased. It was refunded one day before the incident in the house and presence of PW3, deceased sister.

42. After the money was refunded PW3 testified of a veiled threat by the accused against the deceased when he warned her “continue with your pride”. The deceased indifference was also obvious when according to PW3 she told the accused that she did not need a husband. Neither could she marry another woman’s husband before running away.

43. The accused was placed at the scene of murder by PW2. PW2 saw the accused jump out of her compound from the roof of the outer toilet located at the main gate. PW2’s evidence received corroboration from the evidence of PW7 the crime scene officer. She captured blood stains on the roof of the toilet which were fresh. That was captured in photographs Nos. 32, 33 and 34. She also captured foot prints on the perimeter wall near the gate showing man passed near the gate where the toilet was. These were photos Nos. 30 and 31.

44. There was evidence of conduct of a guilty mind. On 5th January, 2015 one day after the murder, the accused attempted suicide by climbing a tree and hanging himself with a rope. The rope was an exhibit. The accused did so when PW6 the arresting officer walked into his gate to arrest him.

45. There is no explanation for accused attempt to hang himself except the fact he had a guilty mind. Mrs. Omung’ala submitted that PW6’s evidence that accused attempted to commit suicide needed corroboration. The legal position is no corroboration is required. Besides PW6 was an adult. No suggestion was made that he had any grudge against the accused to implicate him with this offence. I believe he was telling the truth.

46. In regards to malice aforethought, it was held in **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR)**, where BOSIRE, O’KUBASU and ONYANGO OTIENO JJA., while considering what constitutes malice aforethought observed as follows:

“when the appellant set upon the deceased and cut her with a panga several times and then proceeded to cut the young Allan in similar manner, he must have known that the act of cutting the deceased persons on the head with a sharp instrument would cause death or grievous harm to the victims. We are therefore satisfied that malice aforethought was established in terms of Section 206(b) of the Penal Code.

In view of the foregoing, we are in no doubt that the appellant was convicted on very sound and watertight evidence as his guilt on the two counts of murder was proved beyond

any shadow of doubt.”

47. In this case, malice aforethought can be inferred from the number of stabs the accused inflicted on the deceased. The act of stabbing the deceased 15 times and leaving the knife on her neck clearly shows that the accused was well aware and indeed had contemplated the consequences of his actions.

48. The question is whether accused defence was plausible and reasonable. Accused denied causing the deceased death. The accused contradicted PW3 stating his meeting with the deceased in the presence of PW3 was cordial and that before the deceased left them she hugged him.

49. I considered the cross-exam of PW3 by the defence. No suggestions were put to her that she had lied about an acrimonious exchange between accused and deceased and the veiled threats against the deceased. The accused defence that the meeting with deceased in PW3's house was amicable was not true.

50. The defence annexed two documents in the final submissions. These were an Eulogy of PW1 and a Daily Nation newspaper story of 6th July, 2016. In the story in the newspaper, there is an allegation that PW1 was found dead after he was abducted. The story had an innwendo that PW2 may have been involved in PW1's death.

51. The Eulogy and Newspaper were not adduced in evidence but were merely annexed to the final submissions. The two were therefore not evidence.

52. Even supposing it was adduced as evidence, I find no nexus between PW1's murder and the murder in this case. For once the defence never suggested to PW2 in cross-examination that she was behind the death of the deceased in this case.

53. More importantly however is the motive for PW1's murder in the newspaper story being associated to sale of property. It had no connection with a love affair. In fact PW2 in cross-examination said that the way she knew PW1 he had no love affair with the deceased or anyone else.

54. The submission by defence trying to bring in PW2 as the culprit to deceased murder was far fetched, in fact too remote. I find it was a failed attempt to shift blame for deceased death from the accused. That has failed in total.

55. Having the accused defence, I find the same was not reasonable or plausible for reasons I have stated herein. I therefore reject the accused defence in total.

56. Having considered the entire evidence adduced by the prosecution in this case, I am satisfied beyond any doubt that the circumstances from which an inference of guilt was sought to be drawn has been cogently and firmly established by the prosecution in this case, that the prosecution has established circumstances which unerringly points towards the accused guilt, and that all 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 and none else.

57. I find that the prosecution has established the charge of murder contrary to **section 203** of the **Penal Code** against the accused person beyond any reasonable doubt. I find the accused guilty of murder as charged and accordingly convict him under **section 322** of the **Criminal Procedure Code**.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF FEBRUARY, 2017.

LESIIT, J

JUDGE