



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 19 OF 2015

REPUBLIC.....PROSECUTOR

-VERSUS-

AMOS WANGEU SIMIYU alias FELIX WANGILA SIMIYU.....ACCUSED

J U D G M E N T

1. The Accused is charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code. In that on the 11th day of March, 2015 at Sanctuary, Karagita in Naivasha Sub-County within Nakuru County, he murdered **Silas Wafula Makokha**. The Accused denied the charge. He was represented by Mr. Mburu F. I.
2. Through its nine witnesses the prosecution advanced the following case. The deceased resided at a place known as Sanctuary in Naivasha. Among his immediate neighbours were **Stephen Muraya** (PW5) and **James Odhiambo** (PW6). The deceased was a member of the church known as King's Outreach where **David Kuria Wambui** (PW3) presided as a pastor. PW3's sister **Jane Wanjiku** (PW2) was also a member of the said church.
3. Months prior to the material date, the Accused was cohabiting with PW2. They had two children. A few weeks before the murder, they had separated and PW2 returned to her parents' home at Karagita. On the evening of 11/3/2015 the deceased, **PW3** and **PW2** attended a home fellowship within Sanctuary. The fellowship ended at about 7.00pm.
4. PW2 went home but about 7.30pm she ventured outside to go and buy provisions at a nearby stall. In the darkness she was suddenly gripped by the accused who demanded to know where 'Silas' was. An argument ensued before PW2 managed to escape.
5. On his part, the deceased left for home and on the way passed by the home of a relative, one **Eliud Buyela** (PW4) to borrow some money, before proceeding home. That was about 8.00pm. It would seem that the deceased nearly got home as at about that time, his neighbours **PW5** and **6** were drawn from their respective houses by the deceased's cries to the effect. **"I am being killed"**, but without naming the assailant.
6. Outside, the two witnesses were confronted by a wounded, bleeding and staggering deceased who said he had been stabbed, before collapsing and dying. Police were called to the scene by PW3. The body was taken away.

7. Early on the next day, the Accused accosted **PW2** at her home and warned her not to disclose about her encounter with him on the previous night. He also demanded that she collect all her effects from his house. The Accused left the home thereafter but was subsequently arrested. The post mortem examination performed by **Dr. Ngulungu** (PW1) revealed that death was caused by severe chest injuries due to stab wounds to chest, that perforated both lungs causing them to collapse.
8. Upon being placed on his defence, the Accused elected to give an unsworn statement. To the effect that he was a resident of Karagita working as a farm hand prior to the arrest, and that he was estranged from his wife, PW2. He stated that he was arrested on 13/3/2015 at his work place, ostensibly for threatening PW2. He said no grudge existed between him and the deceased and denied involvement in his murder.
9. The attack on and cause of death of the deceased is hardly in dispute; he was waylaid as he returned home from a church meeting and fatally stabbed on the material night. The court must determine whether, with malice aforethought, the Accused attacked the deceased, thereby occasioning him fatal injuries.
10. At the outset, the prosecution evidence that tended to connect the Accused with the offence is circumstantial in nature. In the case of **Joan Chebichii Sawe –Vs- Republic [2003] eKLR** cited by the defence, the Court of Appeal restated the applicable principles in considering such evidence, as follows:-

“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 hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party Accused.”

11. In the instant case, several relevant facts were not in dispute. For instance, the fact that the Accused was estranged from PW2 and that on the material evening she had attended an evening church meeting where the deceased was also present, among others; that previously a close relative of the deceased by the name Gideon had attacked the Accused, stabbing him on the head severally and that the source of conflict was allegedly Gideon's suspected attentions towards PW2 which the Accused considered unwelcome.
12. As regards the material date, the prosecution relied in part on several disputed facts introduced through PW2 and tending to place the accused in the vicinity of the scene of the assault. The defence counsel urged the court to treat PW2's evidence with circumspection as she had been the source of the dispute between the accused and Gideon, who on the available evidence had become a fugitive. For my part, I would think the more cogent reason would be the fact that the relationship between the Accused and PW2 had become strained enough to result in the witness ceasing to cohabit with the Accused. PW2 said in her evidence that the Accused had been violent, apparently towards her.
13. The evidence of PW2 is that at about 7.30pm the Accused accosted her as she walked to the kiosk from her home. He grabbed her asking **“where is Silas?”** She continued:

“I did not know such man. He insisted and we started arguing and I fled into the shop area which is lit by electricity”

She further stated that she enlisted the help of a person called *“Coaches”* to escort her home. Later on the same night she learned from her mother that Silas had died through an assault. It was her

further testimony that on the next day the Accused came by her house and inquired if she had revealed to anyone about their encounter the previous night. He warned her not to. At that moment she called her brother (PW3) intervene.

14. The night incident obviously occurred in a dark place, but according to PW2 she identified the Accused by voice. In the case of **Joseph Muchangi Nyaga & Another –Vs- Republic [2013] eKLR** the Court of Appeal cited an old authority on the question of identification by voice, namely, **Choge –Vs- Republic [1955] IKLR** as follows:-

“Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure it was the accused’s voice, that the witness was familiar with it and recognised it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.”

15. PW2 as the accused’s wife and having lived with him was well familiar with the Accused’s voice. She said she recognised his voice. At first, the Accused allegedly grabbed at her demanding to know where ‘Silas’ was. When she resisted, an argument erupted between them before she fled. Hence their encounter, if PW2 is believed, was not a fleeting one. Although “Coaches” who later escorted the frightened PW2 home, and her mother to whom she later gave an account of the incident in the night were not called to testify, her brother PW3 was.

16. PW3 and another pastor of his church were called to the scene by the deceased’s relative, PW4 who had parted with deceased about 8.00pm. PW3 stated that when he got home on the material night PW2 narrated the night’s preceding events to him. He said he “**did not bother**” but became concerned on the next day when PW2 came running to his house to report the presence of the Accused and that she seemed to be frightened. The Accused had allegedly asked her to go and collect all her belongings from his home. PW3 said he saw the Accused on the said morning but he disappeared almost immediately from the scene.

17. Was PW2 a reliable witness? In my view, she must have narrated to PW3 the events of the early night later in the night after learning from her mother that Silas (deceased) was dead. I closely observed PW2 testify. First of all she struck me as fairly unsophisticated young woman. She did not come across as a particularly bright spark. Her evidence was delivered with a certain blunt sincerity. It did not seem to me that PW2 was the kind of person who was capable of contriving such a story. Nor even one capable of being coached and expected to hold up a contrived narrative. During her cross-examination, she candidly admitted the matter concerning Gideon and his attack on the Accused, herself being the alleged cause.

18. With regard to the deceased, she said she did not know of any disagreement between him and the Accused. Despite the initial encounter with the Accused happening at night, any element of doubt as to the identification of the Accused in the dark by PW2, is in my opinion removed by the Accused’s actions on the next day. It was in the morning. The Accused went to PW2 demanding to know if she had revealed to anyone about the encounter of the previous night, warning her against it. When PW2 went running to PW3 on the said morning, PW3 came out and saw the Accused at a nearby fence but he went away immediately. PW3 said that PW2 was frightened at the time.

19. In the circumstances of this case, PW2 was well placed to identify the Accused by voice and there seems to be no possibility of mistake or fabrication of the relevant evidence. Equally, regarding the defence submissions that PW2 was not reliable witness in view of her alleged relationship with Gideon, the victim of the disputed incident was the accused who had been injured. I cannot understand how falsely implicating the Accused in Silas’ murder can be related to that incident. Besides it is not clear what PW 2 stood to gain from falsely implicating the accused, in the circumstances of this case.

20. And as I have indicated, **PW2** openly spoke about her estrangement from the Accused. It is unlikely that **PW2**, having learned of the stabbing of Silas, with whom no relationship has been suggested, decided to make up a story to frame up the Accused. Although the Deceased was related to Gideon there was no evidence that the Accused had any personal issues with the deceased. For all the foregoing reasons I accept as true the evidence of **PW2**.
21. From the sequence of events, the deceased was killed within minutes of the encounter between the Accused and **PW2** which was placed between 7 – 7.30pm. The scene of the murder was close to the home of **PW2**. Indeed the witnesses **PW2, 3, 4, 5** and **6** all resided at the same village called Sanctuary. Moments before his death Silas had left the home of his relative **Eliud (PW4)** having passed by at 7.30pm to borrow some cash.
22. According to **PW5** and **PW6** the attack occurred at the compound where they and Silas resided, at about 8.00pm. The geographical proximity between the home of **PW2** and the murder scene as well as the timings of events given by the witnesses **PW3, PW4, PW5** and **6** lend credibility to the evidence of **PW2**, and place the Accused at the vicinity of the scene of the offence. It is not conceivable that five unrelated witnesses would give evidence so consistent in this regard if they were untruthful. Secondly, none of the witnesses **PW4, 5** and **6** have been shown to have any axe to grind with the Accused.
23. **PW2** told the court that the Accused was looking for Silas early on the material night, and was persistent, leading to an argument with her. The question is why. It is true, **PW2** admitted there were two men called ‘Silas’ in the village/church and that she didn’t know which Silas was being sought by the accused. However, the morning after the death of Silas, the Accused came to **PW2**’s house to warn her not to divulge to anyone about his accosting her on the night of the murder. From this, it is evident, in my opinion that the ‘Silas’ he had been inquiring about was the deceased and hence he did not want the conversation disclosed, now that he was dead. Why did the Accused persist in looking for Silas on the material night; to the extent of literally stalking **PW2**?
24. His warning of the next day can only make sense if his intentions for seeking Silas were not for good. This evidence, when taken together with the proximity in time and location of events surrounding the stabbing of Silas, raises a formidable case against the Accused. The deceased was stabbed twice in the chest, puncturing both lungs. He died almost instantly. The proven circumstances of the case lead to a strong hypothesis that the Accused, was looking for Silas with the intention of harming him, obviously with a sharp object.
25. The Accused’s defence that he was arrested because he threatened his wife in part supports **PW2**’s testimony but is otherwise unbelievable. His indirect suggestion thereby that he was somehow framed up by the police for an offence he did not commit does not sound plausible. Besides, it is displaced by the overwhelming prosecution evidence mounted against him.
26. Looking at all the evidence, I cannot see any co-existing circumstances that could weaken the hypothesis of guilt, as in my opinion, the proven inculpatory facts are incompatible with the innocence of the Accused. Secondly the said facts are incapable of explanation upon any other reasonable hypothesis other than that of Accused’s guilt.
27. The proven facts lead to a strong hypothesis that the Accused, on the material set out in search of the deceased and on finding him stabbed him twice killing him instantly. There was no altercation or fight preceding the wounding but all the facts suggest that the actions were premeditated: the search, being evidently armed and the inflicting of two fatal stabs to the torso. No doubt the Accused’s intentions, executed with tragic results were to cause grievous harm, if not kill the deceased.
28. It is not clear what motivated these actions, and in this case it is unnecessary to consider that question. Be that as it may, it is telling that the Accused had already been involved in a fight over

PW2 with one Gideon whom he suspected to be eyeing his wife. Possibly the accused was an excessively jealous husband. His insistent questioning of **PW2** at night soon after a church meeting where Silas was in attendance may point to a likelihood that the Accused harboured suspicion that the said Silas was keeping the company of and showing amorous attentions towards **PW2**. The circumstances in which he accosted **PW2** in the night would suggest he may have been stalking her. The deceased was apparently accosted in the same manner and fatal injuries inflicted on him in a short time, the attacker vanishing in the darkness before **PW5** and **6** could step outside.

29. Whatever the case, the Accused set out to search for Silas, and on finding him, stabbed him to death on the material night before escaping. I am satisfied that the prosecution has established, beyond reasonable doubt, the case against the Accused. I do find him guilty and convict him as charged.

Delivered and signed at Naivasha, this **12th** day of **February, 2016**.

In the presence of:-

State Counsel : Miss Waweru holding brief for Mr. Kibelion

For the Accused : Mr. Mburu

Court Assistant : Steven

Accused : Present

C. MEOLI

JUDGE