



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 34 OF 2010

REPUBLIC PROSECUTOR

VERSUS

DOUGLAS NDUMBA ACCUSED

JUDGMENT

Douglas Ndumba is charged with two counts of murder contrary to **Section 203 as read with Section 204 of Penal Code**. The particulars of the offences are that between 24th and 28th June 2006 at Mworoga Village, Kithuene Sub-Location, Rwarera Location, Meru, murdered **Isaac Kirimi** and **Ziporah Gatuma**. The accused denied committing the offences prompting the prosecution to call a total of six witnesses. When called upon to defend himself, accused testified on oath and did not call any witness.

PW1 Teresia Mukiri is the accused's wife. She testified that on 19/6/2006, she left her home in Mworogo for Kisumu where she went to represent Cotton Growers from her area in a workshop. She returned home on 23/6/2006 about 6.30 p.m. and found accused and their children. Next morning, she was outside her house getting firewood when she found a place was recently dug and made like a nursery bed. On enquiring from accused, he told her that he had prepared a nursery bed for planting tobacco; that later her mother-in-law Ziporah Gatuma (now deceased) came to her home and informed her that Isaac Kirimi, her sister-in-law's son (nephew) had been called by accused to help him carry some baggage and that she had not seen him since. PW1 enquired from accused on whereabouts of Kirimi but he said that Kirimi had only passed by; that they contacted their relatives on phone enquiring if they had not seen Kirimi but they all denied; that PW1 and her mother-in-law Ziporah went to report at Police Station that Kirimi was missing. They returned home and Ziporah went to her home which was about 2 kilometres from PW1's home. Later that evening, **Pamela Gatwiri (PW6)** the daughter of pw1 who used to live with Ziporah went and asked PW1 if she had seen Ziporah, her grandmother. They started looking for Ziporah in her house, amongst neighbours till night fell but they did not get her. PW1 informed accused about Ziporah having gone missing and he went to her home to check and he returned and confirmed that Ziporah, his mother was missing. The search continued and on Friday, PW1 sent the accused to Mrathankari, to inform his father about the events but in the evening, accused could not confirm whether or not he went to tell the father. Instead, accused claimed to have reported to Police Station at Tutua. PW1 disagreed with accused and he chased PW1 away from their home. PW1 went to her parent's home. She returned next day but did not find the accused. On Monday, PW1 heard screams and on going to find out, was informed that bodies had been found and she fainted and never went to see the bodies. She never saw accused again till she was called to court to testify; that accused did not attend the mother's burial and that of his nephew.

PW2 Catherine Kajuju, a neighbour of accused and PW1, recalled that on 2/7/2006, she saw a dog carrying a human hand. She had received news of people who had gone missing and she called the brother to accused. People came and retrieved the hand from the dog and on examining it, identified it as belonging to Kirimi who had disappeared; they heard other screams about 100 metres away. She went and found the body of Ziporah which she recognized by the shoe on the leg and that beside the body of Ziporah was that of a young man.

PW2 also said that the recovered the bodies had been dragged to that place from Ndumba's (accused) farm.

PW3 Susan Kiambi, also a neighbor of the accused and PW1, recalled that on 29/6/2006, PW1 informed her that Ziporah and Kirimi were missing but she denied having seen them. She joined in the search for the two but they did not get them and at one time even accused helped them check Ziporah's house to see if she was inside. On Sunday, she heard screams, went to the scene and saw 2 bodies; one was the lower torso which had a shoe which she identified as belonging to Ziporah; but that the second body was decomposed and she could not identify it. She also noted that the bodies had been pulled to the scene and a rope was still tied to one of the legs.

The post mortem was conducted by **Dr. Njiru** and the reports produced in court by **Dr. James Kihumba**. In respect of Kirimi's body, the Doctor found it to be decomposed with some parts missing, scalp was missing, the skull had a fracture on the left parietal and occipital regions and another on the neck but many other parts were missing. The Doctor formed the opinion that the cause of death was pulmonary arrest due to intracranial haemorrhage; that the head injury occurred before decomposition (PEX.No.1).

In respect of Ziporah, the Doctor also found that some body parts were missing, the head was missing and only the lower limbs were available and the cause of death could not have been determined (PEX.No.2).

PW5 George Kaburugu is a brother to accused. He was informed about his mother and nephew having gone missing and he travelled home from Nairobi. He was informed of a foul smell emanating from accused's home where they suspected something was buried. They went to dig it out next day but found somebody had already dug the place out. Later, the two bodies were found in a nearby farm. He did not find accused at home but saw him after his arrest 3 years later; that despite calling him, accused never responded.

PW6 Pamela Gatwiri, Accused's daughter used to stay with her grandmother, Ziporah. She recalled that on 22/6/2006, she was in the kitchen with her grandmother Ziporah while Kirimi was in another house; that accused called Kirimi and asked him to go and hold for him a sack of beans and that Kirimi and accused left together; that Kirimi locked the door and gave her the keys. He did not return till they slept. She went to school next morning and in the evening, Ziporah informed her that Kirimi had not returned. Next evening, she did not find her grandmother (Ziporah). She went to enquire from her mother (PW1) about Ziporah but she could not be found. She found accused at his home. They went back to lock up Ziporah's home. Together with PW1, they looked for Ziporah but did not get her. She did not know how her grandmother died.

In his sworn defence, accused stated that he is a carpenter; that his mother informed him that Kirimi, his nephew, had gone missing from the mother's home. He did not do anything because he believed Kirimi had gone back to his parent's home. On the next day, when he returned home from the market, PW1 informed him that his mother had gone missing. They looked for her but in vain and he reported to the Police Station. Because he had left his workshop in Nyahururu, he decided to go back to Nyahururu before the mother and Kirimi were found; that he came back after 2 weeks and found they had been buried; that in June 2010 an officer went to his workshop and informed him that his brother had alleged that he murdered the two. He was brought back to Kirua Police Station. He accepted having gone to ask for Kirimi to help him pack maize in sacks but wanted him to do so next day.

After the close of the defence case, Mr. Igweta submitted that the prosecution had failed to prove the case to the required standard because there was no eye witness and no evidence connected accused to the murder; that the cause of death was not established.

Mr. Mulochi on the other hand submitted that the evidence against accused is circumstantial and that it does incriminate the accused and that failure to call the Investigation Officer is not fatal to this case.

There are three essential ingredients of the offence of murder which the prosecution must prove beyond reasonable doubt namely;

- (a) death of a person;**
- (b) that the accused caused the death through an unlawful act or omission; and**
- (c) that the accused had malice aforethought.**

No doubt, there was no eye witness to the death of the two, Kirimi and Ziporah.

This case therefore wholly turns on circumstantial evidence. What constitutes circumstantial evidence has been the subject of many judicial decisions. In the case of *Abang'a alias Onyango v Rep. CRA 32 of 1990*, the court of Appeal set out the principles to apply in order to determine whether circumstantial evidence adduced in a case can be a basis of a conviction. These are:

“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 fully established;***
- (ii) These circumstances should be of a definite tendency unenxingly pointing towards the guilt of the accused;***
- (iii) the circumstances taken cumulatively should form a complete claim 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.”***

See also *Sawe v Rep (2003) KLR 354*.

Circumstantial evidence can therefore be a basis for conviction only if there is no other existing evidences weakening the chain of circumstances relied upon. In the instant case, there is no doubt that the accused was at his home about the time the two deceased met their death. PW1, 3 and 6 confirmed that fact.

PW6 who is the daughter of the accused recalled that on the evening of 22/6/2006, her father came to her grandmother's home and called Kirimi to go and help him pack something in a sack. According to PW6, Kirimi went with accused and never returned that night because he left the keys with her and that is the last time Kirimi was seen alive. Accused admitted having gone to ask Kirimi to go help him pack maize in a sack but that Kirimi was to go the next day. Accused did not at all challenge PW6's evidence and I have no reason to doubt it.

When PW1 returned home, accused's own mother came looking for Kirimi at accused's house on 24/6/2016 because it is accused who had last called him. I am satisfied that accused is the one who called Kirimi and left with him from Ziporah's house. The accused is under a duty to explain what happened to Kirimi, which duty he has not discharged. **Section 111 of Evidence Act** places a duty on the accused to explain what happened to the deceased and it does not in any way mean that the burden of proof has been shifted to him to prove his innocence. He only needed to give a plausible explanation as to what

happened to Kirimi on the night he went away with him never to be seen alive again. **Section 111 of the Evidence Act** reads:

“111. (1) When a person is accused of any offence, 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 he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether n cross-examination or otherwise, that such circumstances or facts exist:

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.

(2) Nothing in this section shall –

(a) Prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of providing that the circumstances or facts described in subsection (1) do not exist; or

(c) affects the burden placed upon an accused person to prove a defence of intoxication or insanity.”

PW1 told the court that when she returned home, she found a freshly dug up place behind their house where accused claimed it was a nursery where he wanted to plant tobacco. PW5 who arrived at the said home stated that there was a foul smell emanating from the said place but that when they wanted to dig it out next day, they found it had already been dug out and was open. PW1 also told the court that Gladys, the mother of Kirimi informed her that there was indeed a foul smell emanating from her compound but she did not smell it. It seems that no further investigation was done on the said ‘nursery’ but it is suspect what accused had dug behind his house. After it was found it was dug up again and accused vanished from home from that day.

According to PW1, after Ziporah came to ask for Kirimi and they enquired from accused, he denied knowing where Kirimi was, they reported to Police Station and after parting, Ziporah went missing and accused also took part in looking for her. The two bodies of the deceased were later found in a neighbours home on 2/7/2006. PW2, 3 and 5 saw the decomposing bodies and identified them as those of Ziporah and Kirimi. PW2 specifically said one of the legs had a shoe which Ziporah used to wear. Though her upper torso was not recovered, these are people who knew Ziporah well. PW5 an uncle to Kirimi, also identified Kirimi’s decomposing body. The post mortem confirmed that Kirimi’s head had fractures which had occurred before the decomposition. The cause of death was said to be cardio pulmonary arrest due to intracranial haemorrhage resulting from the head fractures. It means that Kirimi was injured on the head before death. Though the upper part of Ziporah’s body was not found, these bodies were found tied together and stashed in a sack and PW2 and 3 said there was evidence that they had been pulled from the direction of accused’s land. I am satisfied and find that both Kirimi and Ziporah were murdered because it is not just a coincidence that the bodies were found together; and the person who murdered Kirimi must have been the one who murdered Ziporah too.

In the middle of the search for his mother and Kirimi, accused vanished. His explanation is that he

went back to his place of work in Nyahururu but that is not true. His wife PW1, did not know where accused went. Accused's brother PW5, also said he found when accused disappeared. How can a normal person disappear from home when his mother and nephew had mysteriously gone missing and he never called to find out what had happened to them? Though the accused claims to have returned home after 2 weeks, that is not true because PW1 stated that she never saw him again from the day he disappeared till she saw him in court. From 2006, accused was arrested and arraigned in court on 22/6/2010 – 4 years after the murder. PW5 corroborated PW1's evidence that accused was not traced till his arrest. Accused's conduct speaks volumes. When the freshly dug nursery behind accused's house seemed to raise suspicion, he disappeared into thin air. Accused's defence is all an afterthought. At no time during the testimonies of the prosecution witnesses especially PW1, 5 and 6, was it ever put to them that accused worked away in Nyahururu as a carpenter. PW1 and 6 were not aware that he was working in Nyahururu. The defence is an afterthought, untrue and it is dismissed as such.

The Investigation Officer was not called as a witness. Efforts to trace him were futile. It has been held time and again that a prosecution in a criminal case should not collapse just because the Investigation Officer failed to testify. The Court of Appeal in **P.M. & 2 Others v Rep 2014 KLR** said that failure to call a witness can only be construed against the prosecution if it can be demonstrated that had such a witness been called, his or her evidence would have been adverse to the prosecution. In **Haward Shikanga alias Kadogo & Another v Rep, C.R.A. No. 102 of 2007**, the court said:

“We think that in all cases it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e. calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution.”

In this case, there is not even a suggestion that the Investigation Officer's evidence would have been adverse to the prosecution because ordinarily, an Investigation Officer is not an eye witness but will usually tell the court about recording statements or how he visited the scene and arrested. Failure by the Investigation Officer to testify is not fatal to this case.

As pointed out earlier in this judgment, the case solely turns on circumstantial evidence. Circumstantial evidence is very often the best evidence. **In Rep v Taylor Weaver and Donovan (1928) 21 CR APP R 20**, the principles regarding application of circumstantial evidence were laid as follows:

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

Again, in **Tumuheire v U (1967) EA 328**, Sir Udo Udoma (CJ) stated as follows:

“It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence is in a criminal case, often the best evidence in establishing the commission of a crime by a person as in the present.”

I found that accused failed to give a plausible explanation as to what happened to Kirimi having been the last person to take away Kirimi from his grandmother's house. Kirimi's decomposing and mutilated body was later recovered in a neighbour's farm together with accused's own mother's mutilated body (Ziporah). Accused's conduct of running away when a search was ongoing for his own mother and nephew, and his disappearance for a period of over 4 years leaves no doubt in my mind that he was the perpetrator. This evidence is further supported by the freshly dug 'nursery' behind accused's house and the fact that the bodies had been dragged from accused's land. Malice aforethought flows from the fact that Kirimi was first killed and his body disposed of. When Ziporah started a search for Kirimi, pointing at accused as the last person who was with Kirimi, accused carefully planned and did murder Ziporah and

disposed of her body together with Kirimi's.

Having carefully considered all the evidence on record, including accused's defence, I am satisfied that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis and the chain of events is so complete that it points at nothing more than that of accused's guilt. I find accused guilty as charged and convict him in accordance with **Section 322 of CPC**.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF APRIL, 2016.

R.P.V. WENDOH

JUDGE

13/4/2016

PRESENT

Mr. Mulochi for State

Mr. Igweta for Accused

Ibrahim/Peninah, Court Assistants

Present, Accused