



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO.31 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

GODFREY MAINA MUIRURI alias SIMO’S FATHER.....1ST ACCUSED

JOSEPH MURIMI KANIALO alias KAIDO.....2ND ACCUSED

JUDGMENT

The 1st Accused, Godfrey Maina Muiruri *alias* Simo’s Father and the 2nd Accused, Joseph Murimi Kanialo *alias* Kaido were charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the night of 21st May 2010 at Kibera Laini Saba in Nairobi County, the Accused, with another not before court, murdered Badira Amina Mohamed (the deceased). When the Accused were arraigned before this court, they pleaded not guilty to the charge. The prosecution called ten (10) witnesses in a bid to establish its case against the Accused. Trial commenced before Mwilu J (as she then was). She heard two (2) prosecution witnesses. The proceedings were then taken over by Muchemi J. She heard eight (8) prosecution witnesses. The prosecution then closed its case. After the close of the prosecution’s case, the court found that the prosecution had established a *prima facie* case to entitle the Accused to be placed on their defence. Muchemi J was transferred from Nairobi. This court took over the proceedings at the defence stage. The Accused did not have objection to the court proceeding with the case from where it had reached. The Accused gave sworn statements in their defence. After the close of both the prosecution’s and the defence’s respective cases, the respective counsel for the prosecution and the Accused filed written closing submission in support of their respective cases. This court shall revert to the arguments made in this case after setting out the facts of this case.

The family of the 1st Accused Godfrey Maina Muiruri and the family of the deceased were residents of Kibera Laini Saba. They lived within a walking distance of each other. The family of the 1st Accused are Christians while the family of the deceased are Muslims. A son of the 1st Accused, Solomon Muiruri (Solomon) had an affair with the deceased. The deceased was at that time a student at Ndumberi High School in Kiambu. Solomon made the deceased pregnant when she was in Form 3. This resulted in the deceased dropping out of school. She stayed home with her parents PW1 Zuleha Ibrahim and PW4 Bakiti Mohamed Sadala. She gave birth to a baby girl. According to PW1, although initially Solomon owned up to the responsibility of the child, and indeed promised to take care of the deceased and her daughter, after the birth of the child, Solomon disowned the deceased. It was this failure by Solomon to own up to his responsibilities that led to the deterioration of the previously cordial relationship that existed between the family of the 1st Accused and that of the deceased.

According to PW1, on 5th February 2010, Solomon went to her home in the absence of the deceased and took away the baby. A dispute arose between the family of the deceased and that of the 1st Accused in relation to the custody of the child. The deceased reported the unconsented removal of the custody of her child to the police at Laini Saba Police Post, then Highrise Police Post and finally to Kilimani Police Station. Despite making these reports, the deceased was not assisted. When the deceased inquired from Solomon where he had taken the child, the deceased was informed that the child had been taken to stay with Solomon's mother. According to PW1, on 16th April 2010, the deceased went to Solomon's mother and inquired of the whereabouts of the baby. She was told that the child had died and had been buried. PW1 went to confirm the information from Solomon's mother. She was given the same information. The truth as would later emerge was that the child was indeed alive and well but the family of the 1st Accused was concealing her whereabouts to the deceased and the members of her family.

The issue regarding the whereabouts of the child resulted in disharmony between the two families. PW1 testified that the deceased did not relent in her quest to have her child back. This was after she learnt that the child was alive. On 17th May 2010, she again sought assistance from the police at Kilimani Police Station to get back the custody of her child. This time the matter was taken up by the police. Solomon was told to take the child to the police station. He complied. The custody of the child was returned to PW1 and the deceased three days later. From PW1's testimony, it was apparent that Solomon's family, particularly his sisters, were not happy with this turn of events. She testified that when the deceased and her sister called Leila were returning from hospital (where they had taken the child for treatment), they were assaulted by the 1st Accused's daughter called Serah. This caused further discord between the two families. PW1 went to the 1st Accused's home and met with Serah and her mother. She inquired from them why they had assaulted his daughters. It was apparent that harsh words were exchanged during this encounter. There was an altercation. Later that evening at about 7.00 p.m., the 1st Accused, the 2nd Accused, Solomon and other men went to PW1's house accompanied by 2 police officers. PW1 was arrested and taken to Kilimani Police Station.

PW2 Kassim Mohamed Bakit, a son of PW1 testified that on 21st May 2010 at about 7.30 p.m., he arrived home and was informed that PW1 had been arrested. He took a taxi to Kilimani Police Station. He found PW1 being booked at the station. PW1 told him not to worry as everything would be okay. He inquired from the police why they had arrested PW1. The police told him that PW1 had been arrested for resisting arrest and malicious damage to property. He was with the deceased. He returned home with the deceased after the police advised them to sort out the issue of the release of their mother on the following day. Before they reached home, PW2 lost contact with the deceased. PW2 (who is blind) realized that the deceased was no longer with them. He went to his home. Shortly thereafter, he recalled that the deceased went to his house crying that she had been beaten. She mentioned specifically the 1st Accused, Simo and Njeru. She advised her to take the matter easy and relax at his home. He called PW4 to deal with the issue. Before long, he heard a neighbour by the name Phyllis call him. Phyllis informed him that Njero, Simo and the 1st Accused had taken away the deceased. He again called PW4 and informed him to take action. It was PW4 who later told him that the deceased had been killed. According to PW2, the dispute between the family of the deceased and that of the 1st Accused arose from the custody and support of the child born out of the relationship between the deceased and the son of the 1st Accused, Simo.

PW5 Hajira Yusuf Mohamed was a minor aged 14 years at the time she testified in court on 18th April 2013. She gave sworn testimony after the court had established that she understood the meaning of an oath and was possessed with sufficient intelligence to give rational answers to questions put to her. She testified that at the material time, she used to live with her grandmother, PW1. She used to attend a day primary school within Ngumo Estate. She recalled that on 21st May 2010 at about 3.00 p.m. she returned home from school. She found PW1 at her shop. PW1 told her to go home and have something to eat. She decided to go to the house of the deceased (her aunt) instead of going home. She found the deceased bathing her child. She stayed for a while with the deceased. She later went to the house of PW1. While there, during that evening, she testified that two police officers arrested PW1. The deceased accompanied the police officers with PW1. PW1 was taken to Kilimani Police Station. She was not immediately told why she was arrested. It later emerged that she had been arrested due to a complaint lodged by the 1st

Accused in this case. According to the evidence, PW1 was being accused of malicious damage to property and resisting arrest. PW1 was to spend the night at Kilimani Police Station.

Meanwhile, later that night, PW5 testified that the deceased returned home. Her clothes were muddy. She told PW5 that she had been assaulted by the family of the 1st Accused. The deceased particularly mentioned the 1st Accused, Solomon and the daughters of the accused by the names Nduta, Chiru and Chiku. Another person mentioned was Jaymo. The deceased requested PW5 to get her water so that she could clean herself of the mud. As the deceased was washing herself, PW5 testified that a group of people came to their home. They included the 1st Accused, Solomon (Simo), Njeru, Chiku, Jaymo, Nduta and the 2nd Accused. Nduta is the daughter of the 1st Accused and the wife of the 2nd Accused. According to PW5, the group took away the deceased. Before they left, Nduta warned PW5 not to follow the deceased. Shortly thereafter, PW4 came home crying. She told PW5 that the deceased had been killed.

PW4 testified that on the particular day of 21st May 2010, the deceased told him that she had been beaten by Simo and his friends, who included the 2nd Accused. This was during the day. PW4 escorted the deceased to the Administration Police Camp where she made the report of the assault. The deceased was advised to go to hospital and have a P3 form filled. They were advised to obtain the P3 form from Kilimani Police Station. Since they did not have money at the time, they returned home. PW4 went to look for the 2nd Accused with a view to resolving the issue of his mother who had been arrested by the police at the instance of the family of the 1st Accused. He met with the 2nd Accused. The 2nd Accused promised that he would have the mother of the deceased (PW1) released from police custody. While going home, he saw a body lying near a drainage. Since it was at night, he used the torch of his mobile phone to illuminate the body. He identified the body to be that of his sister. The 1st Accused, Solomon (Simo), the 2nd Accused, Nduta and the 1st Accused's wife were standing near the scene.

PW4 called his father PW3 Bakit Mohamed Sadala and informed him what had transpired. PW3 arrived at the scene. The police were informed. PW7 Corporal Joram Karani arrived at the scene at about 2.00 a.m. accompanied by other police officers from Kilimani Police Station. He told the court that he saw the body of the deceased. It had multiple injuries on the head. He called a Scenes of Crime officer to take photographs of the scene. He recalled that while at the scene, he saw the 1st Accused and a woman being chased by members of the public. They were being beaten on suspicion that they had been involved in the death of the deceased. PW7 rescued the 1st Accused and took him to Kilimani Police Station. PW8 PC Kupchor Kipsamo, a Scenes of Crimes Officer attached to Buru Buru Police Station testified that he was requested to visit the scene of crime and take photographs. He visited the scene of crime at Kibera Laini Saba and took six photographs at the scene. The photographs were generally of the body of the deceased. The photographs were produced as Prosecution Exhibits Nos.3(a) and (b).

After the incident, the 2nd Accused was not arrested because he disappeared from the scene. Upon his arrest in September 2010, PW9 Inspector Pauline Njeri Kamau was instructed by the investigating officer to conduct a police identification parade. The parade was conducted on 14th September 2010. In the parade, the 2nd Accused was identified by PW5. Upon their arrest, the accused were taken to be assessed by PW6 Dr. Z. Kamau to determine if they were mentally fit to stand trial. PW6 saw the 2nd Accused on 13th September 2010. He established that the 2nd Accused was mentally fit to stand trial. The doctor had earlier examined 1st Accused on 28th May 2010. He noted that the 1st Accused had the following injuries: his right eye was red, he had bruises on the nose, his right front incisor was missing, his upper right lateral incisor was broken, he had a wound on the upper side of the lip and on the right balm. He also had bruises on his leg. He complained of painful knees. PW6 testified that the 1st Accused told him that he had beaten by a mob on 21st May 2010. The injuries were caused by both blunt and sharp objects. The P3 forms were produced into evidence.

The case was investigated by PW10 PC James Mamai. He testified that upon conclusion of his investigations, he established that the deceased had been killed by the accused persons and other family members at large due to a dispute arising out of the birth of the child from the relationship between the

son of the 1st Accused and the deceased. He testified that his investigations had revealed that it was the accused persons who picked the deceased from her home, took her away before they killed her. PW10 produced the post mortem report prepared by Dr. Oduor on 22nd May 2010 at the City Mortuary. The doctor noted that the deceased had multiple facial and scalp contusions and lacerations. She had a swollen upper lip. She was bleeding from ears, nose and mouth. He formed the opinion that the cause of death of the deceased was due to head injury as a result of blunt trauma. The post mortem report was produced as an exhibit in the case.

When the accused were put to their defence, they both gave sworn testimony. They denied that they were involved in any way with the death of the deceased. The 1st Accused explained that they had a long standing dispute with the family of the deceased arising out of the estranged relationship between his son, Simo and the deceased. He testified that the family of the deceased harassed him and even assaulted him. The situation became so bad that he had even made arrangements to relocate from Kibera estate. He denied being involved with the death of the deceased. Likewise, the 2nd Accused testified that he was innocent with the charge because he was not involved at all with the crime. It was his evidence that he had been framed by the family of the deceased.

In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond any reasonable doubt. The burden of establishing the accused's culpability is on the prosecution. The accused person has no obligation to prove his innocence. His duty is restricted to only raising reasonable doubt on the prosecution's case. The burden of proof never shifts to the accused person. In the present case, the prosecution relied on both circumstantial and direct evidence to establish the charge of murder brought against the accused persons.

This court has carefully evaluated the evidence adduced in this case. It has also considered the submission made by counsel. The direct evidence was adduced by PW2 Kassim Mohamed Bakit, PW4 Ishmael Mohamed Bakit and PW5 Hajira Yusuf Ibrahim. These witnesses testified that on the material evening of 21st May 2010, the deceased told them that she had been assaulted by the accused persons and their relatives who included Simo, the estranged lover of the deceased and Nduta the sister of the Simo. She is also the wife of the 2nd Accused. PW5 testified that the deceased arrived in the house when she was muddy. She was crying. She told PW2 that she had been assaulted by the accused persons. PW5 testified that the deceased changed her clothes and took bath. As she was taking bath, the accused persons accompanied by the mentioned relatives came to their home and took away the deceased. Nduta warned PW5 not to raise any alarm.

PW2 testified that, due to the fact that he was blind, he could not see what was going on. However, he testified that a neighbour called Phyllis informed him that the accused persons had taken away the deceased. PW2 called PW4 and informed him to pursue the matter. PW4 went to the homestead of the 1st Accused which was a short distance from their home. It was there that he found the body of the deceased lying near a trench. The deceased was dead. She had multiple head injuries. This court saw the photographs taken by the Scenes of Crime Officer. The court also considered the post mortem report. It was clear to this court that the multiple injuries on the deceased's head were inflicted soon after the deceased had been taken away from her home by the accused persons. The identity of the accused persons, as the persons who participated in the taking away of the deceased from her home, is not in doubt. This is because the accused persons were well known to PW2, PW4 and PW5 prior to the material night. They were neighbours and had interacted for a long time.

Although no one saw the accused persons actually assault the deceased, this court has considered the evidence adduced by PW2 and PW5 which was to the effect that prior to her death that night, the deceased had told them that she had been assaulted by the family of the 1st Accused and specifically the accused persons, Simo and Nduta, among others. The evidence adduced by the prosecution witnesses' points to the fact that the deceased was assaulted twice on that day. She was assaulted earlier in the evening before the accused persons and the members of their family returned back and took away the deceased before fatally assaulting her. In arriving at this conclusion, this court has relied on circumstantial evidence. As was held by the Court of Appeal in the case of **Sawe- Vs- Republic [2003] KLR 364** at

“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 the 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.”

In the present case, it was clear to this court that the inculpatory facts adduced by the prosecution witnesses pointed irresistibly to the fact that it was the accused persons and members of their family who killed the deceased after they had dragged her from her home. The accused persons were seen by PW5 taking the deceased from her home. The deceased told PW2 and PW5 some moments before she was taken away that she had earlier been assaulted by the family of the accused. The evidence adduced by PW2, PW4 and PW5 placed the accused persons at the scene when the deceased was taken away from her home. This court earlier observed that there existed bad blood between the family of the deceased and that of the accused persons. This bad blood was as a result of the custody and maintenance battle for the child born from the relationship between the deceased and Simo or (Solomon), the son of the 1st Accused. It was apparent to this court that the family of the 1st Accused was not happy with the fact that they had been forced to return the custody of the child to the family of the deceased three days prior to the fateful date. The family of the 1st Accused had forcefully and unlawfully taken custody of the child four months prior to being compelled by the police to return the custody of the child to the deceased. This formed the basis of the grudge that existed between the two families. Matters were not helped by the fact that it was apparent that harsh words were exchanged between members of the two families. These altercations involved the deceased and Simo in particular.

This court was not persuaded by the defence put forward by the accused persons. It was clear to this court that it was the accused persons who were the aggressors. Matters were not helped by the fact that it appeared that the police had taken sides in the dispute. According to PW1, whenever the family of the 1st Accused made complaints to the police and the local administration, the police took immediate action and had members of her family arrested. The reverse was however not the case. Whenever members of the deceased’s family made complaints to the police or the local administration, no immediate action was taken. It was not by coincidence that at the time the deceased was killed, her mother PW1 was languishing in police custody in Kilimani Police Station.

Taking into consideration the totality of the evidence adduced in this case, this court holds that the prosecution established, to the required standard of proof beyond any reasonable doubt, that it was the accused persons in company of others at large, who assaulted the deceased and caused her to sustain the fatal injuries.

The issue that remains for determination is whether the accused persons killed the deceased with malice aforethought. **Section 206** of the **Penal Code** states that:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- a. ***an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;***
- b. ***knowledge that the act or omission causing death will probably cause the death or a grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;***
- c. ***an intent to commit a felony;***
- d. ***an 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.”***

In the present case, it was clear that the accused persons had a grudge with the family of the deceased and particularly with the deceased. The grudge was caused by the decision by the family of the deceased to reclaim back the custody of the child. It was clear to this court that the accused persons, with their accomplices who are at large, intended to cause grievous harm to the deceased. The death of the deceased therefore was a natural consequence of this intention and their joint action. This court therefore holds that the prosecution established malice aforethought to the required standard of proof beyond any reasonable doubt.

In the premises therefore, the accused persons are accordingly convicted as charged of **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MAY 2010

L. KIMARU

JUDGE