REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 51 OF 2010

REPUBLIC.....PROSECUTION

VERSUS

SAMUEL NDUNGU KAHURA.....ACCUSED

JUDGEMENT

1. The accused person **SAMUEL NDUNGU KAHURA** is charged with Murder contrary to **section 203** as read with **section 204 of the Penal Code Cap 63**. The particulars of the offence are:

> **'That on the 13th day of July 2010 at Kangoo village, Mangu location in Gatundu District within Central Province murdered John Kahura Muhia.'**

2. The trial in this case was begun by Mwilu, J. as she then was who heard the evidence of PW1 to PW6. The case was taken over by Muchemi, J who heard PW7 and PW8. I took over the case and heard PW9 to PW11 and the defence case.
3. The prosecution called a total of 11 witnesses.
4. The facts of the prosecution case were that the accused shared a house with the deceased, who was his father. The deceased homestead was located at Kangoo Village, Mangu location in Gatundu District. It was a closed compound that had a main house and a seperate Kitchen. There were two gates, the main gate that led into an enclosed area and a second one which ushered one into the compound where the deceased home and the separate kitchen were located. The rough sketch and the fair sketch of the homestead showing the way the houses were located were produced in court as P. exh. 9A and B.
5. On the material evening, PW6 a daughter of the deceased went to her father's home that day where she cooked for her father and the accused. The three of them shared a meal before she warmed water for her father to wash his feet and then left. Before leaving PW6 had a discussion with her father over the accused person because he looked so stressed and distant and ate very little food. PW6 testified that her father urged her to let the accused be as he had not been feeling well. PW6 was also concerned that the accused tried to light up a fire even though it was no longer necessary but her father advised her to let him light it as it was possible the accused was feeling cold.
6. PW6 was sleeping with her younger sister in her aunt's home which was within the compound of homesteads which were inside the first gate spoken of herein above, not far from her father's place.
7. The prosecution case was that the neighbours of the deceased, PW1, PW3, PW4, PW5 and PW6 while at their respective homes all heard commotion coming from the deceased's house. PW3 a step brother of the deceased was the first to get out of his house to check on the deceased. At the

gate he met PW4 his nephew. As they drew near the deceased home they met PW5. PW3, 4 and 5 found the gate to deceased homestead locked. They broke into the compound. Inside they heard that the commotion was coming from the kitchen. They found the kitchen door locked from the inside. PW5 removed an iron sheet from one side of the kitchen in order to enter. As PW5 lifted the iron sheet wall, the accused opened the main door of the kitchen and came out. The accused person was arrested by neighbours who had arrived at the scene as he attempted to flee.

8. Inside the kitchen floor the deceased was found bleeding from an injury on the head. He was unconscious. PW1 and two other neighbours took the deceased to hospital. The deceased died on the way before they reached the hospital. The accused had also been carried in the same vehicle together with the deceased. PW1 took the accused person to the police station where he was arrested.
9. PW 7 arrested the accused person who was brought to the station at around 10pm. He visited the scene of crime the following morning at around 11.00am together with his colleague P.C Marioba. They found a pool of blood in the kitchen. The walls of the room, utensils, firewood and other house hold items were found to have blood stains. PW7 took from the scene blood stained items as exhibits. These were a panga P. exh. 1, pluck of wood, P. exh. 2. He also took over a green jacket and a black trouser, P. exhs 3 and 4, which the accused was wearing on the material day.
10. According to the post mortem examination report produced by PW8 the deceased had multiple fractures of the skull on the parietal, frontal and occipital bones and a subdural haematoma on the left parietal area. Dr. Anakabane who performed the post mortem formed the opinion that the cause of death a head injury due to subdural haemorrhage on the left parietal area. He produced the post-mortem report in court as P. exhibit 5.
11. PW 9 conducted a mental status assessment on the accused person on 19th July 2010 and found the accused fit to stand trial.
12. PW 10 Dr. Ann Wangechi Nderitu produced the report by the Government Chemist prepared by her colleague Mr. Peter Kangethe who had since retired. She also produced an exhibit memo showing the items that they had received from Corporal Bugon. These were:

    Blood sample of the deceased,

    Blood sample of the accused,

    A piece of wood,

    A panga,

    A grey jacket

    A blue khaki trouser.

13. The results of analysis of the DNA profiles from the blood stains on the piece of wood, the panga, the jacket and the trouser (p. exhs. 1, 2, 3 and 4) matched the DNA profile generated from the blood sample of the deceased.
14. The accused was placed on his defence and he opted to make an unsworn statement. The accused person advanced an alibi as his defence and explained that on the material day he had gone to the shops to buy cigarettes on credit and when he returned and reached the gate to their home, he heard noises and people shouting at him; "***umeua" "umeua***" meaning ***"you have murdered".*** He said that the people beat him up and put him in a vehicle before they took him to the police.
15. The Prosecution Counsel Ms onunga and the Defense Counsel Mr. Masara opted not to make any submissions at any stage of this case.
16. I have carefully considered the entire evidence adduced by the prosecution and the defense in this case.
17. The accused is charged with one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. **Section 203** of the penal code provides as follows:

    "Any person who of malice aforethought causes death of another person by an

unlawful act or omission is guilty of murder."

18. The burden of proof lies with the prosecution to prove that the accused person attacked the deceased causing him injuries as a result of which he died. The prosecution must prove that at the time the accused attacked the deceased he had formed an intention to either caused death or grievous harm to the deceased.
19. 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 constitutes malice aforethought under **section 206** of the penal code. **Section 206** of the **Penal Code** sets out the circumstances which constitute malice aforethought in the following terms:

> **"206. 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 of or 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."**

20. There are two issues for determination in this case:

1. **Whether the prosecution has adduced sufficient evidence to establish that the injuries which led to the deceased death were inflicted by the accused person, and;**
2. **Whether the prosecution has established that the accused had formed the necessary malice aforethought when he inflicted the injuries in question on the deceased?**

21. The Prosecution is relying on circumstantial evidence to prove the case against the accused there being not a single eye witness of the attack on the deceased. The principles which apply in determining whether the evidence adduced qualifies as circumstantial evidence and whether it is sufficient to found a conviction is well settled.
22. Regarding circumstantial evidence, the test applicable was set in the celebrated case of **ABANGA alias ONYANGO V. REP CR. A NO.32 of 1990(UR)** where the learned Judges of the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence. They set them out thus:

> **"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 the accused and none else."**

23. In the case of further principles of testing circumstantial evidence are set of in **REP V. KIPKERING ARAP KOSKEI & ANOTHER 16 EACA 135,** where the Court held:

> **"In order to justify the inference of guilt, the inculputory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt**."

24. More principles are set out in **SAWE –V- REP[2003] KLR 354** , where the Court of Appeal held

as follows:

> **"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.**
4. **...**
5. **...**
6. **..**
7. **Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."**

25. And in the English case of ***R. vs. Taylor Weaver & Donovan*** **(1928) 21 Cr. App. Reports 20,** the court held:

> **"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."**

26. The prosecution has relied on the evidence of PW6 who said that she left the accused person with the deceased at the deceased house after having dinner together on the night of 13th July 2010. According to PW6 she had not settled down in her aunt's place when she heard the commotion in her father's home. By the time PW3, 4 and 5 went to the home the gates were locked and the kitchen where the incident occurred was locked from inside. It was the accused who opened the kitchen and inside was the deceased lying with serious wounds on his head. The deceased died soon thereafter before reaching the hospital.
27. There was also other evidence against the accused. The results of analysis of the DNA profiles showed that the DNA profiles generated from the blood stains on the items recovered at the scene namely the piece of wood, the panga, P. exhs 1 and 2, together with the jacket and trouser of the accused, P. exhs 4 and 3all matched the DNA profile generated from the blood sample of the deceased. That means that the accused had close contact with the deceased which was the only explanation of how the blood stains of the deceased were found on his clothes.
28. The deceased suffered from a fracture on his skull, and several cuts on his body inflicted by the brutal attack on him. The post mortem report described these cuts in detail. The report attributed the cause of death as resulting from this head injury. From this report, it is clear that the deceased's death must have been caused by someone who intended to severely injure him.
29. The evidence of the investigating Officer lent credence to the prosecution case. He established that the deceased and the accused person were the only ones staying in the deceased house. He drew a sketch plan of the scene which he produced in court as exhibits 9 (a) & (b) confirming how proximate the deceased house was with that of PW3. Those findings were unchallenged by the defence.
30. I find that the evidence adduced by the prosecution through PW6, 3, 4 and 5 places the accused at the scene of murder. It also shows clearly that the accused was with the deceased when the fatal injuries were inflicted upon him.
31. This evidence also places upon the accused a statutory burden to discharge a rebuttable presumption created under **sections 111(1) and 119 of the Evidence Act.** These sections stipulate as follows:

> **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 in 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."

"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

32. Having been placed at the scene of murder as the last person seen with the deceased while still alive and the first person seen with the deceased after the fatal injuries were inflicted upon him, the accused has a duty to give an explanation of the circumstances surrounding the deceased death or what caused the injuries that led to his death.
33. The accused in his defence put forward an alibi. He stated that he was not at home when the deceased met his death. The accused stated that he had gone to buy cigarettes when upon returning home he met a huge crowd of people who immediately arrested him saying he had murdered his father.
34. The accused defence does not shake the prosecution evidence which demonstrated clearly that after PW3, 4 and 5 arrived at the deceased kitchen the person who opened the door from inside was the accused. Apart from the deceased who had fresh injuries, there was no one else inside that kitchen except the accused. That evidence rebuts the accused defence that he was coming from outside when he was arrested. The prosecution has proved beyond any reasonable doubt that he had been in the kitchen alone with his father. The 3 witnesses who were first to arrive at the scene all heard that the commotion was taking place inside the same kitchen where they found the accused and the deceased.
35. I did consider that it was at night and from the evidence no one speaks about the nature of light at the scene. As I stated earlier the case was not heard by me. Nonetheless the accused does not deny that the incident occurred or that he was present at the time PW3, 4 and 5 arrived at the home. What the accused denies is being inside the room where the deceased was murdered.
36. I find that given the evidence of PW3, 4 and 5 that the gates to the deceased home were all locked, and that the kitchen door was also locked from inside with the deceased and the accused the only ones inside the kitchen, that there is no possibility that the deceased was attacked and injuries inflicted upon him by anyone else except the accused person. The defence did not suggest that the three witnesses were lying or had a reason to falsely implicate the accused with the offence. Not to mention that PW3 was accused uncle and deceased step brother while PW4 was accused cousin and deceased nephew. These were close family members and no suggestion was made that they could have been lying.
37. I find that the accused defence does not meet the statutory requirement placed upon him under **sections 111(1) and 119 of the Evidence Act**. Therefore the rebuttable presumption created by these two sections that the accused having been the last person to be seen with the deceased while he was still alive and the first to be found with him after the fatal injuries were inflicted on the deceased before he died the accused must have known how he died. By denying he was not there, the accused said an obvious lie.
38. The courts have had an occasion to determine the impact of an accused person giving an obvious lie in answer to facts which are in his interest to offer an explanation for. In such circumstances the Court of Appeal in the case of **ERNEST ABANGA ALIAS ONYANGO VS REPUBLIC CA NO. 32 OF 1990,** observed:

"In **RAFAERI MUNYA alias RAFAERI KIBUKA V REGINAM (1953) 20 EACA 226**, **the appellant there was convicted of murder and the case against him was mainly based on circumstantial evidence. In his sworn evidence at the trial, he made some denials which were obviously false. It was held that**:

The force of suspicious circumstances is augmented where the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disapproved or disbelieved become of substantive inculpatory effect".

This case in our view, does not in any way go against the basic legal principle that the burden of proving a criminal charge beyond doubt is solely and squarely upon the prosecution. But its basic holding, namely that when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent availably".

39. The *recidendi* of that case is that where an accused person either attempts no explanation of facts which he may reasonably be expected to be able and interested to explain or when an accused person tells an obvious and deliberate lie which is disproved or disbelieved, then such a lie is capable of providing corroboration to other independent circumstantial evidence adduced against him.
40. The accused gave an alibi that he was not at the scene of the crime and was only arrested when he returned from buying a cigarette. The Court of Appeal in **UGANDA V. SEBYALA & OTHERS [1969] EA 204** adopted a decision made in the same year by Georges, CJ in **TANZANIA CRIMINAL APPEAL 12 D68** thus:

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is then an alibi which is not particularly strong it may very well raise doubts."

41. The accused alibi does not stand as it does not create any doubt in the strength of the prosecution case against him. The accused was found inside the kitchen with the deceased injured with fresh wounds. His clothing had blood which when analyzed was found to be that of the deceased. His alibi is in the circumstances rejected.
42. The prosecution has firmly established the circumstances from which an inference of guilt is sought to be drawn. Those circumstances unerringly points towards guilt of the accused. I am satisfied that the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability it is the accused and no one else who committed this offence. I find that the evidence adduced by the prosecution was consistent and corroborative. I find that it was not only credible and truthful but also overwhelming against the accused person.
43. The deceased was cut several times. The doctor described the injuries in the post mortem report as deep multiple scalp cuts on the head with fractures. In the oft cited case of **DANIEL MUTHEE -V- REP. CA NO. 218 OF 2005 (UR),** BOSIRE, O'KUBASU and ONYANGO OTIENO JJA., the court of appeal 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."

44. The court of appeal in **MORRIS ALOUCH VS REP CR. APPEALS NO 47 of1996 (UR)** considered further what acts can constitute malice aforethought and stated as follows:

> **"If repeated blows inflicted the injury then malice aforethought could well be presumed but in this case we have to contend with one single blow which caused perforation of the intestine which led to internal bleeding which did not become apparent until the death of the deceased some four days later."**

45. In view of the multiplicity of the cuts, and the deep nature of the injuries inflicted on the head of the deceased person, I am satisfied that the accused person had formed the necessary malice aforethought to commit the offence of murder, therefore taking all the facts and circumstances of this case cumulatively, I find that they form a chain so complete that there is no escape from the conclusion that within all human probability the accused committed this offence and that at the time he had formed an intention to cause death or grievous harm to the deceased.
46. I must make mention of issues which arose in the course of the trial. There are three Mental Assessment reports on record. The report is by Dr. Kitazi dated 21st July 2014 indicated that the accused had a long standing history of substance abuse prior to committing the murder offence. He noted the accused was smiling and laughing to himself and grimacing before he started him off on anti-psychotic medication. The second one is a report by Dr. Ochieng dated 9th March 2015 indicating that the accused was well oriented in time, place and person and had insight into his current situation; that he had not been on medication for the previous eight months and was fit to plead.
47. The third report was made pursuant to an order I made in court on the 7th December 2015 for re-assessment of the accused person's mental status due to remarks the accused made in court on that day during a mention. The accused was at the time also incoherent as he made the utterances. On the 14th January 2016 Dr. Ochieng examined the accused and observed that the accused was well oriented and wrote that he had denied having a history of mental illness. He found the accused fit to plead.
48. These three reports made by two different doctors at different times, show that the accused had mental instability at one time, which is on 21st July, 2014. The accused was fit to plead on the 26th July, 2010 and on 2nd August, 2010 when he first appeared in court and when he took plea respectively. After 21st July, 2014 the accused has not behaved in a manner that could put to doubt that he was of abnormal mental status. **Section 166(1)** of the **Criminal Procedure Code** which provides for the procedure of conducting trial where the accused was of unsound mind could not apply to this case.
49. More important however is that the defence did not invoke the defence under **section 12** of the **Penal Code**, at any time during the trial, including his defence. In the circumstances I rule that the defence of insanity not having been raised was not considered.
50. Having considered all the circumstances of this case, I am satisfied that there are no co-existing circumstances that could negate or destroy the inference of guilt. The circumstances of this case irresistibly point to the guilt of the accused person.
51. I have therefore come to the conclusion that the prosecution has proved the charge of murder against the accused as charged. I reject the defence by the accused and find him guilty of the offence of murder contrary to section 203 of the Penal Code, under section 322 of the Criminal Procedure Code and convict him accordingly.

DATED AT NAIROBI THIS 5TH DAY OF MAY, 2016.

LESITT, J

JUDGE.