



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 54 OF 2012

REPUBLICPROSECUTOR

VERSUS

STEPHEN KIMANI KAMAUACCUSED

RULING

INTRODUCTION

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on the 12th day of July, 2012 at Gatukuyu village Gatundu District within Kiambu County murdered Regina Wanjiku Kimani.

2. On 24/7/2012 the accused appeared before court when plea taking was deferred to ascertain the mental status of the accused and on 5/6/2013 he pleaded not guilty to the charges. On 23/10/2014 the accused was released on bond pending trial.

3. On 25/5/2015 when the matter came up for hearing the prosecution applied for adjournment on the ground that their witnesses were not present in court and the matter adjourned to 26/5/2015 when it was once again adjourned for lack of witnesses.

4. On 11/11/2015 the matter was fixed for hearing before me when the prosecution, through Mr. Mwenda, applied for adjournment on the ground that they did not once again have witnesses and sought for witness summons to be issued against the following named witnesses:-

1. MAGDALINE NJERI CHEGE

2. GABRIEL GATONYE WAMBURU

3. JOYCE NYAKIO WAMBURU

4. PETER GITHINJI CHEGE

5. The matter was once again adjourned and fixed for hearing on 12/11/2015 at which the State once again applied for adjournment on the grounds that they had been unable to serve witness summons on the named witnesses since the summons had been issued late by the court. Despite the State having been given the last adjournment the prosecution once again applied for adjournment on the ground of lack of

witnesses which application was opposed by the defence.

6. Upon hearing the investigating officer one **Cpl. EKIRU KIRIMONDI** on the challenges he was facing in securing the attendance of civilian witnesses who were related to the accused and the deceased and in the interest of justice the State was granted a further adjournment.

PROSECUTION CASE

7. On 21/6/2016 the court declined to grant the prosecution further adjournment and the prosecution commenced their case by calling **PW1 DR. ANTHONY KAMAU MURAGE** who testified on oath that he conducted post mortem examination on the body of the deceased and externally found that it had bruises on the side of the head, blood clot on the hand, bruises on the right and left thigh, right and left leg and left shoulders, there was also fractured rib and as a result of the examination he formed an opinion that the cause of death was chest injury with rib fracture, pneumothorax and subdural hematoma with multiple bruises and defensive wounds in keeping with assault.

8. PW2 PC MOSES KIMITEI testified that on 12/7/2012 at 2.00 p.m. he was on duty when he received a report from the accused that his wife, the deceased who had been sick for a long time died while being taken to Gatundu Hospital. He issued the same with a note to enable him take the body to Bishop Okoye mortuary. He further testified that the following day he was called by the OCS who instructed him to go and arrest the accused on allegations that he had killed the deceased.

9. It was his evidence that he proceeded to the home of the accused where he arrested the same. He conducted a search in the house but did not recover any murder weapon. Upon interrogating the accused, the same stated that the deceased had been sick for some time and produced medical treatment card to confirm. In cross examination he stated that he came to hear that the deceased had died at home from the information the OCS had received from members of the public.

10. PW3 INSPECTOR ISAAC TANAI testified on oath that on 12th July, 2012 he was instructed by the OCS to proceed to Mwea Police post where the death of the deceased had been reported where he found that the accused had been arrested and proceeded with him to his home where he protected the scene. It was his evidence that clothes had been thrown all over the house in the bedroom, sitting room as an indication that something was not in order. He searched the house for any murder weapon but found none. Under cross examination he stated that he went to the scene with PC Kimutai and found only one boy in the home and that he did not see the body of the deceased.

SUBMISSION

11. At the close of the prosecution case Mr. Saenyi for the accused submitted that the state had not proved the two fundamental elements of murder and that the evidence of the investigating officer was merely hearsay as no witness was called to link the accused with the offence neither was there any circumstantial evidence tendered by the prosecution to link the same. It was submitted that no evidence was tendered by the State on the motive of the offence and therefore the evidence on record does not meet the threshold to enable the accused be placed on his defence. Mr. Ogige for the State submitted that he was relying on the evidence tendered before the court.

DETERMINATION

12. At this stage, the court is called upon to make a determination as to whether the prosecution has made out a case to enable the court call upon the accused to offer an answer to the same. The legal basis for this determination was stated in the case of **REPUBLIC VS JAGYIWAN M. PATEL & OTHERS (1) TLR (R) 85** thus:-

“All the court has to decide at the close of the evidence in support of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence. It may be a strong case or it may be a weak case. The court is not required at this stage to apply its

mind in deciding finally whether the evidence is worthy of credit or whether if believed, it is weighty enough to prove a case conclusively beyond reasonable doubt. A ruling that there is a case to answer could be justified in my opinion in a boader line case where the court, though not satisfied as to the conclusiveness of the prosecution evidence is yet of the opinion that the case made out is one which on full consideration might possibly be thought to sustain a conviction.”

13. In criminal cases the prosecution is under a duty to prove its case beyond any reasonable doubt as a condition to the conviction of the accused who at this stage as submitted by Mr. Saenyi has the option of choosing not to offer any evidence. Based upon the evidence tendered before the court by PW2 and PW3 which is mere hearsay and whereas there remains a strong possibility of the involvement of the accused in the death of his wife based on the evidence of PW1, mere suspicion however strong is not enough to convict an accused person in a criminal trial.

14. The State did not offer any evidence to link the accused with the death of the deceased and whereas the court appreciates the difficulties the State has faced in its attempt to secure material witnesses, I find and hold that the State has failed to make out a case to enable the court place the accused on his defence under the provisions of Section 306(1) of the Criminal Procedure and hereby find the accused not guilty of the murder of **REGINA WANJIKU KIMANI**.

15. I must however commend the investigating officer in this matter police **Cpl. No. 6629 EKIRU KIRIMONDO** of the efforts the same made in attempting to secure the civilian witnesses who are related to the accused person and who for reason best known to themselves decided not to cooperate with the investigating officer so as to enable the court come to a just conclusion in this matter. Noting that justice looks at both sides and therefore there was no justification in keeping this matter alive hoping that one day those witnesses might see the sense to come up and testify in view of the express provisions of Article 50(1)(e) the right to have the trial begin and concluded without reasonable delay.

16. The Accused shall therefore be set free forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nairobi this 11th day of October, 2016.

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J. WAKIAGA

JUDGE

In the presence of

Mrs. Kinoti for Mr. Mwenda for the State

Mr. Saenyi for the accused

Accused present

Tabitha court clerk