



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 26 OF 2008

REPUBLIC

VERSUS

MACHARIA KIHARA.....ACCUSED

JUDGMENT

The accused person was charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. According to the particulars of offence, on 22nd April, 2008 at Kambiti location in Murang'a South District within central province, the accused person murdered Kihara Ngari. He entered a plea of not guilty on 6th June, 2008 and so the case against him proceeded to full trial.

The state called seven witnesses all of whom were heard by my predecessor at this High Court station, Serгон, J.

Armstrong Kamande (PW1), one of the deceased's sons, testified that on 23rd April 2008 while at Kambiti trading centre, he received information from **Martha Waithera (PW2)**, who was his neighbour, that the deceased had been murdered. He made a report to the chief at Kambiti and he was given an administration police officer to accompany him to his father's home, the scene of the murder. They found his mother, **Naomi Wanja** at the home; they also found the deceased's body which, according to his evidence, had visible injuries on the hands and the head apparently inflicted by a sharp object. Corporal Karanja, the police officers who accompanied this witness called the chief's office which in turn informed the police at Makuyu police station of the murder. The police officers came and collected the body.

The witness testified that the deceased lived in the same homestead as his mother and the accused, who is also his brother; he himself lived at Kambiti shopping centre.

Martha Waithera Kamande (PW2) testified that on 23rd April, 2008 the accused person's mother (and the deceased's wife) came to tell her to inform **Armstrong Kamande (PW1)** that his father had been murdered. She informed him accordingly and thereafter proceeded to the deceased's home where she found his body lying on a bed.

One of the deceased's relatives, **Geoffrey Karanja (PW3)**, testified that he was also informed of the deceased's death by one Mama Irungu on 23rd April, 2008 at about 6:30 PM. He arrived at the home at about 7 PM but he did not find anybody. The following morning he went to Murang'a district hospital mortuary to identify the deceased's body during the post-mortem. **Peter Mwangi Nduati (PW4)** also testified that he went to the deceased's home when he got the report of the deceased's death on 23rd April,

2008. He met the deceased's wife at home and also saw the body which bore cut wounds on the hands and on the head; it was lying on a bed.

Corporal Abraham Mungai (PW5) testified that on 27th April, 2008 a person by the name Wakinduri reported that his brother, the accused, had killed his father. He proceeded to the scene of crime and indeed confirmed that the deceased had been killed. On 30th April, 2008 he got a call from Constable Kinuthia from Munero administration police post that the suspect of the murder had been arrested. This police officer together with his colleague, administration police Constable Galgalo rearrested the suspect and took him to Makuyu police station where he was handed over to the officer commanding station.

The deceased's daughter **Jacinta Njoki Macharia (PW6)** also testified that she got information of her father's death on 22nd April, 2008 while she was at her matrimonial home. She was one of the persons who identified the deceased's body at the mortuary during the post-mortem.

Dr Abraham Gatangi conducted the post-mortem on the deceased's body and prepared a report of his findings. This report was produced in court on his behalf by **Dr Samuel Owino (PW7)** the then provincial psychiatrist at Nyeri provincial general hospital. Dr Owino confirmed that he had worked with Dr Abraham Gatangi for four years before the latter retired from public service and that he was familiar with his handwriting and signature.

The doctor made the following observations in his report; the body he examined was five feet tall and of a male African; he was aged 81 and was of good nutrition. There were multiple bruises on the body; there were blood clots (haematoma); cut wounds on both sides of the head; a fracture of the left arm and leg; collapsed left lung; and a fracture of the 6th to 8th ribs. The cause of death, according to the doctor, was multiple injuries due to a blunt and sharp force. The doctor testified that it was not possible to tell from the post-mortem report the age of the injuries.

The psychiatrist's report on the accused person's mental status was produced by **Dr James Mbugua (PW8)**; he confirmed that the accused person had been examined and found fit to stand trial.

The other expert who testified was **Mr Moses Mwaura (PW9)** who worked as a government analyst at Nairobi. He produced the government analyst report prepared by J.K. Kimani who was then in China for further studies. He testified that he had worked with Kimani for 13 years and he was therefore familiar with his handwriting and signature. According to the report, the government analyst was supplied with the following items for analysis:

1. Blood samples of the suspect Macharia Kihara (A)
2. Blood samples of the deceased Kihara Ngare (B)
3. Vest(C)
4. Jacket(D)
5. Jembe with a wooden handle(E)

The analyst made the following findings:

1. Items C,D and E were stained with human blood
2. Items A and B were human blood Group A
3. DNA Profile:

The DNA profile generated from the blood of the deceased matched with that of the blood stains on the

vest

The last prosecution witness to testify was the investigations officer police **Constable Peter Macharia (PW10)**. It was his evidence that on 23rd April, 2008 at about 10:30 AM he was in the station with inspector Muthui. The officer in charge of the station asked him to accompany him to a murder scene at Kambiti area. They found a body lying on a makeshift bed and the door leading to the room where the body was had been broken. The deceased's clothes were stained with mud and blood. According to the officer, it appeared that the deceased had been assaulted and dragged into the room. The officer suspected the deceased's son, the accused person herein, to have killed his father. His house was about 25 metres from that of his father. He established that the door to his house was locked from inside but the window was open. The officer and his colleagues broke into the house and recovered a blood-stained jembe. He drew the sketch map of the scene and took the body to Murang'a district hospital where a post-mortem was conducted on 30th April, 2008. The officer also re-arrested the accused person after he was handed over to him by the administration police officers. At the time of his arrest, the accused person wore a blood-stained T-shirt and a jacket which was also stained with blood; he surrendered these clothes to the investigations officer.

The officer took blood samples from the deceased and also from the accused person; he prepared an exhibits memo and forwarded these samples together with the jembe and the accused person's clothes to the government analyst for analysis. All these items were admitted in evidence as exhibits.

After hearing the evidence of the prosecution witnesses and at the close of the prosecution case, this Honourable Court held that the accused person had a case to answer; he was therefore put on his defence. He chose to give an unsworn statement; he did not call any witnesses.

The accused person stated that on 22nd April, 2008 he was at Maragua ridge where slept after work. He denied that he was at Kambiti, where his father lived, on that particular day. In short, he denied murdering his father.

That is all there was as far as evidence is concerned.

The offence of murder is defined in **section 203** of the **Penal Code**; its punishment is prescribed in **section 204** of the same Code. These two provisions provide as follows:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

204. Punishment of murder

Any person convicted of murder shall be sentenced to death

To establish a case of murder the prosecution must prove first, that the unlawful death of the victim was caused by an act or omission of the accused person and, second, the accused person did that act or omitted to act with malice aforethought; malice aforethought may be express or implied. (**See Woolmington v DPP [1935] AC 462**).

Malice aforethought is the mental element of murder; it is express when it is proved that there was an intention to kill unlawfully (**see Beckford v R [1988] AC 130**), but it is implied whenever it is proved that there was an intention unlawfully to cause grievous bodily harm (**see DPP v Smith [1961] AC 290**). It is apparent that intent is a common element in both forms of malice aforethought.

Section 206 of the **Penal Code** prescribes circumstances under which malice aforethought may be deemed to have been established; it provides as follows:

206. Malice aforethought

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.

The evidence of the pathologist, **Dr James Mbugua (PW4)** and in particular the post-mortem report was clear that the deceased's death was not natural; in his opinion, the cause of the deceased's death was 'multiple injuries due to a blunt and sharp force'. In the absence of any contrary evidence, it is not in dispute, and I am satisfied that the deceased not only died but also that he was unlawfully killed. It follows that, the first limb of this offence of murder was proved beyond reasonable doubt.

As far as the second limb is concerned, the primary question is whether the accused person was the perpetrator of this offence and if so whether he had the necessary mental element to commit it.

In answering this question, it must be appreciated at the outset that none of the prosecution witnesses ever saw the accused person assault or kill the deceased. The entire prosecution evidence against the accused person was indirect or circumstantial; it is appropriate at this point to evaluate this evidence and consider whether it is sufficient enough to sustain a conviction.

Armstrong Kamande (PW1), one of the deceased's son testified that the deceased shared the same compound with the accused person. The only other person who lived in that compound was the deceased's wife who is also the accused person's mother. The investigations officer corroborated this evidence and produced a sketch map in which he indicated the position of the accused person's house from that of his father, the deceased. According to his evidence, the deceased's house was 25 metres from that of the accused person.

The fact that the accused person shared the same compound with the deceased or that his house was 25 metres from that of the deceased cannot *prima facie* be taken as sufficient proof of the accused's person's guilt; if anything, the accused person denied that he was at home when his father was murdered. Again he was not the only person who lived with the deceased in the same compound; as noted, the deceased's wife lived with him although it did not come out clearly in evidence whether or not she shared the same house with the deceased.

However, it is necessary to look at the evidence in its entirety and once this is done the case against the accused person becomes clearer. Apart from establishing that the accused had a house in the same compound as the deceased, the investigations officer recovered a blood-stained jembe in the accused person's house; when he ultimately arrested the accused person, the latter was wearing clothes that were also blood stained. In order to establish whose blood it was that was on these items, the investigations officer forwarded them to the government analyst together with a sample of the deceased's blood and that of the accused person for analysis.

The government analyst's report was clear that the deceased and the accused person shared the same blood group; this implied that, looking at the blood group alone one could not easily tell whether it was

the deceased's blood or the accused person's that was stained on the jembe and the accused person's clothes. The analyst, however, went a step further and conducted a deoxyribonucleic acid (DNA) profiling of this blood; his findings were conclusive that the blood on all these items was the deceased person's.

The logical conclusion that one can make in the circumstances, is that the jembe was the murder weapon and the accused person wielded it at the time material to the deceased's death. Without any explanation as to how the accused person's clothes were stained with his father's blood and how the murder weapon found its way in the accused person's house, there emerges a complete picture that the accused person bludgeoned his father to death and in the process his father's blood splattered on his clothes and the murder weapon.

Having so held, I am also satisfied that by attacking his father in the manner he did, the accused person knew that the assault would cause his death or would probably cause him grievous harm or he was simply reckless whether death or grievous harm would result. To this extent and, in the absence of any evidence of mitigating factors, I am satisfied that the necessary mental element or malice aforethought was proved to the required standard.

The inculpatory facts, by and large, constitute circumstantial evidence that points to the guilt rather than the innocence of the accused person. **Section 164** of the **Evidence Act cap 80** makes reference to this kind of evidence; it states:-

164. Circumstantial questions to confirm evidence

When a witness the truthfulness of whose evidence it is intended to confirm gives evidence of any fact, he may be questioned as to any other circumstances which he observed at or near the time or place at which the fact occurred, if the court is of opinion that such circumstances, if proved, would tend to confirm the testimony of the witness as to the fact to which he testifies.

An inference of guilt can be drawn from such evidence and where the court is satisfied with its sufficiency it can safely convict; the parameters within which the court can base its conviction on circumstantial evidence is stated in "**Wills on Circumstantial Evidence**" which was cited with approval in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** where the Court of Appeal of East Africa had this to say;

"In order to justify 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. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any 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."

The Privy Council in **Teper versus Republic (1952) AC 480** cautioned that the trial court must be wary of any circumstances that would weaken or destroy the inference of guilt whenever a conviction is based on circumstantial evidence. At page 489 of its decision the court held that:-

"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

My evaluation of the circumstantial evidence against the accused person has led me to conclude that the inculpatory facts are incompatible with the innocence of the accused; these facts are, in my humble view, the recovery in the accused person's house of the murder weapon stained with his father's blood; and, the accused person's clothes stained with the same blood he was wearing when he was arrested. These facts are, in my view, incapable of explanation upon any other reasonable hypothesis than that of the accused person's guilt. I am also satisfied that the prosecution has discharged, satisfactorily so, the burden of

proving these facts.

Finally, in the absence of any evidence contrary to the evidence of the government analyst, I cannot find any other coexisting circumstances which would weaken or destroy the inference of guilt on the part of the accused person.

The accused person's defence that he was away on the date of the murder or that he did not sleep at home at the material time but spend the night at Maragua ridge, was not enough to displace the concrete prosecution evidence linking him to the death of his father; it not carry much weight; suffice it to say, it did not cast any doubt on the evidence against him.

On the whole, I hold that the prosecution has proved its case against the accused person beyond reasonable doubt; accordingly, I hereby find and hold that the accused person is guilty of the offence murder contrary to **section 203** as read with **section 204** of the Penal Code and, pursuant to **section 215** of the **Criminal Procedure Code**, he is convicted accordingly.

Signed, dated and delivered in open court this 4th November, 2016

Ngaah Jairus

JUDGE