



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL CASE (MURDER) NO. 10 OF 2011**

**REPUBLIC.....PROSECUTOR**

**-VERSUS-**

**BAKARI JOHN JUMA.....1<sup>ST</sup> ACCUSED**

**KARISA KITSAU KARISA.....2<sup>ND</sup> ACCUSED**

**J U D G M E N T**

1. The two accused herein face two counts of Murder Contrary to Section 203 and 204 of the Penal Code. The Information states that on the night of 3<sup>rd</sup> and 4<sup>th</sup> April 2011 at Msefuni Village, Hongwe Lamu County they, jointly with others not before the court murdered **Elijah Mwangi Kangethe** in the first count, and **Wanjiru Mukami** in the second count. The accused denied the charges and were represented by Mr. Muranje initially and later Mr. Ogeto
2. The prosecution called ten witnesses. The prosecution case is that **Elijah Mwangi Kangethe** (the deceased) resided in the material time on his farm at Hongwe, Lamu. He resided there with his granddaughter **Wanjiru Mukami** (deceased minor), while his wife **Margaret Wanjiru Mwangi** (PW1) lived in Lamu town where she carried on a business. The deceased had coconut trees on his farm and during the hot seasons, he would invite wine tappers (Wagama) to tap wine from the trees.
3. During the material period, the two accused were tapping wine and living on the farm of the deceased. Their quarters were a few metres from the house occupied by the deceased. In the same period the 1<sup>st</sup> Accused had met and befriended a local lady, **Agnes Karioko Mugo** (PW5) who, it appears, visited the 1<sup>st</sup> accused at the home on several occasions. Subsequently, a tiff occurred between them because the deceased had noticed, and informed PW5 that the said 1<sup>st</sup> accused was being visited by other women in the home. The deceased was unhappy with this behavior and a few days prior to his murder ordered the two accused to stop tapping the palm trees and to leave his home.
4. In his last conversation with PW1 on the night of 2<sup>nd</sup> April 2011 the deceased had expressed frustration that the wine tappers were refusing to vacate. PW1 left home on the next day and returned on 4/4/2011 only to be confronted by the badly mutilated body of the deceased and that of his granddaughter which she discovered inside the main house. The house was locked on the outside. The accused were the first suspects and were arrested by police who were called to the scene. In the case of the deceased, death was due to multiple cuts leading to severe hemorrhage. The minor deceased was found to have been sexually molested. She died from strangulation which resulted in disarticulation of the cervical spine. Some clothes collected from the compound

of the deceased were escorted, alongside the blood samples of the two accused for analysis. The blood stains on the said clothes did not match the accused's blood samples.

5. When placed on their defence the accused elected to make sworn defence statements.

The 1<sup>st</sup> accused stated that he started residing at Mpeketoni in 2002. He was employed by the deceased. He got to meet the wife and son of deceased in 2006 when they visited briefly before leaving for Lamu. In February 2009 while working for the deceased he befriended PW5 who would visit him at the home of the deceased. The deceased was unhappy about that and ordered him to stop and he obliged.

6. In September 2009 he left the deceased's employment because the work had reduced. It was while working for another employer in the following year that police came to question him about the murder of the deceased. He and his co-accused were subsequently arrested and arraigned in court. The 2<sup>nd</sup> accused stated that he worked for the deceased until 2006 when he left for another employer. He was arrested in 2011 in connection with the death of the deceased.
7. There is no dispute that the two accused persons were employed and resided on the farm of the deceased prior to his murder, although the dates of engagement and departure are in dispute. There is no dispute that the deceased lived on the farm main house alone with his grandchild, and for the period the accused worked with him, they were accommodated in a room within the compound. The deceased and his minor granddaughter were murdered at the home on the night of 3<sup>rd</sup> and 4<sup>th</sup> April 2011. On the same day when the bodies were discovered- 4/4/2011- the two accused were arrested and questioned. They were eventually charged. The court must determine whether the accused inflicted on the deceased and the deceased minor, the injuries that occasioned their death.
8. From the outset, it is clear that whoever inflicted these injuries intended to cause grievous harm or death to the victims. The post mortem reports and scene photograph indicate gruesome injuries on the deceased. His body had deep cuts on the neck, deep penetrating cuts in the chest with fractures of the 3<sup>rd</sup> to 6<sup>th</sup> ribs. In addition, deep cuts over the stomach area led to exposure of the intestines and to perforation of the gall bladder. The left eye ball was out of the socket. The minor deceased has both eye balls removed and large extensive bruises on the neck. The neck was dislocated and freely mobile at the cervical spine. There was evidence of sexual penetration.
9. The court must determine whether the two accused persons are responsible for the gory murders of the deceased. There is no direct evidence linking the two accused to the actual murder of the two deceased, because the murder happened in the night and took away the two victims who were the residents of the home. It is evident that the police investigations were conducted incompetently. For instance, vital exhibits, being alleged blood stained clothes of the accused persons collected from the room they occupied were not produced in court. This rendered worthless the Government Chemist's report produced in their respect.
10. What therefore remained against the two accused concerning the actual murder is circumstantial evidence, principally based on two related strands. The first is the evidence of opportunity: that the two accused were in the home on the material night and therefore murdered the deceased. The second is the fact that the deceased had previously expressed displeasure at the romantic adventures of the accused while residing on his land and had ordered them to leave but the accused resisted.
11. Before examining this evidence, it is important to state the applicable principles as enunciated by the Court of Appeal. In **R. -Vs- Kipkering Arap Koskei (1949) 16EACA, 135** the Court stated:-

**“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and 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 always on the prosecution and never shifts to the accused.”**

And again in **Musoke –Vs- Uganda (1958) EA 715**, the court quoted **Teper -Vs- R (2) (1952) AC 480** where Privy Council stated:

**“It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”**

12. One of the witnesses who spoke to the deceased a few days before his death was a neighbour, **Joseph Kimata Njoro** (PW2). He said that the deceased visited his home on 25/3/2011 seeking information unrelated to this case. This is what the witness said:

**“He (deceased) said he had quarreled with and chased his workers off. The deceased complained about his tappers.....”**

The witness was definite that in the material period the 1<sup>st</sup> accused lived at the home of the deceased, in a workers house on the compound. As a close neighbour living about 500 metres away he should know.

13. During cross-examination centering on the fact that his statement to police referred to one worker (wine tapper), the witness freely admitted that the deceased did not mention the names of the worker (s) involved but the witness **“assumed that was the 1<sup>st</sup> accused since I knew he worked for deceased.....”** He denied seeing casuals on the land and said that the deceased only hired seasonal workers for wine tapping but did the actual farm work himself.

14. Other evidence was to the effect that on the night 2/4/2011 and 3/4/2011 the deceased’s wife (PW1) was home with the deceased.

She spent the night there and left on the next day for Lamu town where she conducted her business. The witness recalled her conversation with the deceased that night as follows:

**“He complained about our employees at the farm at Mpeketoni. They were tapping (wine) from our palm trees. He told them he did not want them to continue staying there and had ordered them to leave and to stop tapping the palm trees. The old man said he was upset they were bringing women to the home and having sex with (them). I told him I would return on 6<sup>th</sup> April 2011 try and resolve the matter.....”**

15. She further stated:

**“The accused (identified) are the people who lived on our farm with my husband. Their names are Bakari Juma and Karisa Kitsao.....they lived on a quarters just about ten metres from our main house. I knew that my husband had been upset that the men were refusing to leave his land.....”**

16. In cross examination she stated that there was tension between the accused and the deceased over the issues and that the husband was unhappy, being a Christian, that the workers were bringing women to the compound.

However she said that she did not witness any incident between them. She denied that there were any casuals resident on the farm during the material period and like PW2 stated that wine tapping was a seasonal activity conducted during the hot season. The witness admitted that there were neighbours living next to them and also that their daughter had issues with her own husband hence the meeting planned at the local children’s office on 4/4/2011 at which she had expected to meet the deceased and the son-in-law on the day the murder was discovered.

17. PW2's evidence is corroborated by the boda boda cyclist **Edward Kamau Kinyanjui** (PW3) whom she hired to drive her from Mpeketoni Trading Centre on 4/4/2011 to her home in Hongwe and was present when she discovered the two bodies. Nobody was home at that time according to PW1 and PW3. Another neighbour **Edith Muthoni Wambua** (PW4) who was a neighbour to the deceased confirmed that she had seen the 1<sup>st</sup> accused whom she knew well in April 2011 at the home of the deceased although she did not know what he did there.

18. Bakari's (1<sup>st</sup> Accused) lover at the material time (PW5) stated that the two accused were living with the deceased then. It is the deceased who informed PW5 that 1<sup>st</sup> accused was also entertaining another woman in the home at night, a second girl who apparently was at the time living at PW5's home. PW5 had had a tiff with the 1<sup>st</sup> accused when she confronted him over the allegations of cheating on her.

19. The witness told the court that the deceased had ordered the accused to leave his farm.

The witness claimed, a fact denied by her father, (**Pius Mugo PW10**) when he was summoned by this court, that her father was notified by the deceased about the relationship the girl in his home (PW5's friend) was carrying on with the 1<sup>st</sup> accused. At any rate, PW5 said her mother had questioned her about her visits to the home of the deceased, and she (PW5) later confronted the deceased who allegedly said he had only named the "other woman" who visited the accused apart from PW5. Apart from being challenged concerning whether police treated her as a suspect in the murder, PW5's evidence was not seriously challenged during cross-examination.

20. Thus, the evidence that the accused were living on the farm of the deceased in the period immediate to his death but had been ordered to leave is overwhelming. The accused did not in any way suggest to these foregoing witnesses, despite their assertions to the contrary, that they had already left the home of the deceased by the material period, during cross-examination. Neither was there any serious challenge to evidence that apart from the two victims, only the two accused persons resided at the home in a quarters about ten metres from the home.

21. In his defence, the 1<sup>st</sup> accused stated that he started working with the deceased in 2006 and left in September 2009 when "the work reduced", and that he was working elsewhere at the time of his arrest. He however confirmed the love affair with PW5 and the reaction by the deceased ordering him to stop inviting ladies to the quarters. His defence therefore is that he had long left the deceased's home by the date of his murder.

During cross-examination he confirmed that he and the 2<sup>nd</sup> accused joined and left the deceased's employment together.

22. The dates given by the accused could have been dismissed as an error in reckoning, in view of the fact that some material occurrences and facts coincide with the prosecution evidence. But on a perusal of his evidence, they cannot be. The 1<sup>st</sup> accused said he joined the deceased in 2002. He cited the 22<sup>nd</sup> December 2006 as the date when he first met the wife and son of the deceased and 13/2/2009 as the date he first met and befriended PW5, and September 2009 as the date when he left the home of the deceased.

23. While his statement of described events closely mirrors the prosecution evidence, the dates do not match the events described in detail by the prosecution witnesses. If indeed the 1<sup>st</sup> accused had long left the home of the deceased (about 3 years earlier) prior to the murder or at all, it is most surprising that this material fact was not canvassed during the cross-examination of the prosecution witnesses whose evidence clearly placed him in the murder scene at the time of murder.

24. The 2<sup>nd</sup> accused who also admitted to have been an employee of the deceased together with the 1<sup>st</sup>

- accused also claimed to have left his employment in 2006 but was arrested in 2011. In cross examination he confirmed that upon his arrest he was in the company of the 1<sup>st</sup> accused. He also said that the deceased ordered them off his farm on 4/4/2011 at 11.00am when they “met on the road”. That is the same day, he said that the deceased met his death.
25. One of the first officers to visit the murder scene was **Sergeant Raphael Baraza** (PW7) who made sketches of the scene of murder. He testified that there were clothes in the house where the accused lived and that these and others belonging to the deceased were taken to the Government chemist for analysis. Another officer, who visited the scene early on 4/4/2011 was **CPL Josphat Mutua** (PW8) who took scene photographs. He stated that the bodies of the victims were in the main house (as stated by PW1). He identified a spot in the photographs being the area near the house occupied by the suspects where he noted blood stains and (human) intestines.
26. In cross-examination he reiterated this evidence. PW8 stated that though the chief investigator was **Sgt Baraza**, he managed the crime scene. However, it is unfortunate that the alleged blood stains said to be close to the house of the suspects are not highlighted sufficiently in the photograph identified. The sketches made by PW7 clearly witness that indeed the house of the workers was very close to the main house where the bodies of the deceased were found, with the main door latched from outside on the morning of 4/4/2011 by PW1. Photo number 8 shows a surface possibly stained with blood within the compound of the home. Items (possibly belonging to the deceased) such as a home made lamp (Koroboi), kitchen knife and keys were also found outside the main house. [Exh. 2 – 4].
27. These scene findings and the fact that the door to the main house was not broken into strongly suggest that the attack occurred early in the evening before the victims secured themselves in the main house to retire for the night, and that most possibly, that the attack began outside the main house. Whoever murdered these victims was vicious and took time, to inflict multiple cuts, to gouge out eyes and cause rib fractures on the deceased. The post mortem form lists not less than 8 long and some penetrating cuts on the torso, dislodging the intestine contents.
28. The minor deceased’s body had both eye balls gouged out and multiple extensive bruises on the neck with complete disarticulation of the neck. In addition the post mortem notes that the hymen had been broken and existence of a discharge, all suggestive of sexual abuse. Clearly, these brutal acts cannot have been done in a fleeting attack. It is inconceivable that the victims were slain without uttering a single cry or resistance so that anyone within 10 metres could have been alerted to the attack. Thus if the accused were in their quarters at the time, they were within hearing distance. The presence however is denied
29. In my view, in the circumstances herein, the accused’s defence that they no longer resided at the home during the murder is intended to remove them from that scene during the material hours. That defence is not believable in light of the prosecution evidence tendered. There would be no reason for anyone to blame them for a murder that occurred 3 years since they departed the home of the deceased. And no reason for several witnesses to say they remained in the home until the date of the murder, a fact belatedly admitted by the 2<sup>nd</sup> accused during cross-examination.
30. The defence in the earlier stages of the trial had attempted to show that PW5 and perhaps the son-in-law of the deceased also had a reason to disagree with and perhaps murdered the deceased. However, in respect of the two accused before me, there is sufficient motive on their part, established for them to desire to ‘punish’ the deceased: firstly for interfering with the love affair involving the accused, PW5 and the other woman or women, and secondly for confronting the accused about bringing women to the home, and for insisting on evicting the accused from his farm after their initial resistance.
31. In my opinion, the revenge motive provides credible support to the prosecution evidence regarding the presence of and opportunity of the accused at the home of the deceased at the time of the murder. And is reason for the gruesome and wantonly violent manner in which the victims

were slain. Concerning motive, the Court of Appeal said in **Libambula –V- R (2003) KRL 683:-**

**“We may pose, what is the relevance of motive here? Motive is that which makes a man do a particular act in a particular way. A motive exists for every voluntary act and is often proved by the conduct of a person. See Section 8 of Evidence Act Cap 80 Laws of Kenya.**

**Motive becomes an important element in the chain of presumptive proof and where the case rests on purely circumstantial evidence. Motive of course, may be drawn from the facts, though proof if it is not essential to prove a crime.”**

32. Secondly, the accused’s impossible and contradictory assertion as to whether they left the deceased’s home in 2009, against the overwhelming evidence to the contrary is itself a pointer to their guilty minds. It is also telling that, the accused despite having until 3/4/2011 resisted the deceased’s order to move out, vanished from the home, leaving behind some of their goods, so that no soul was in the homestead on the morning of 4<sup>th</sup> April 2011 when the bodies of the deceased were discovered. The circumstances proven by the prosecution rule out any possibility of the coincidence that some other unknown persons, pounced on the deceased and killed them, on the same date that the two accused happened to leave the farm.

33. The conduct of an accused person in some cases can supply corroboration in a criminal matter. In the case of **Manilal I. Purchit V R [1942] EACA 58** the Court of Appeal citing **R –V- Baskerville [1916] 2 KLR 658** defined corroboration as follows:-

**“ It must be independent evidence which affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it. It is of course necessary to have confirmation of all the circumstances of the crime.**

**Corroboration of some material particular tending to implicate the accused is enough and whilst the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime. Corroboration may also be found in the conduct of the accused.”** (See also *M’Riungu v R [1983] KLR 455*)

34. In the present case, the deceased was last seen alive by his wife (PW1) when the couple parted on 3/4/2011. PW1 went away, leaving behind a distraught deceased who was irked by the continued presence of the accused on his farm, despite his orders for them to leave. PW1 promised to return to address the matter. On the next morning however the deceased and his grandchild are found in their house, brutally murdered. The accused were not in the home. Their explanation is that they left the home almost 3 years prior to the murder, a position totally displaced by the prosecution evidence, and even contradicted by the 2<sup>nd</sup> Accused during cross-examination.

35. The sudden disappearance of the accused is so proximate in time to the murder of the deceased that in the circumstances of this case it provides credible corroboration of the circumstantial evidence mounted against the accused. The reason for the hurried disappearance was the murder of the deceased and his grandchild. The explanation they gave to this court is not only contradictory but totally rebutted and exposed by the prosecution evidence as an afterthought. I dismiss their defence as implausible and unbelievable.

36. In my considered opinion the proven circumstantial evidence here justifies an inference of guilt on the part of the accused persons as the inculcating facts are incompatible with their innocence. In the circumstances of this case I can find no co-existing circumstances tending to weaken the inference of guilt. I do find that the prosecution has proved its case against the accused persons and will convict them accordingly.

**Written and signed at Naivasha this    day of December, 2014.**

**C. W. MEOLI**

**JUDGE**

**Delivered and signed at Malindi this 3<sup>rd</sup> day of March, 2015**

**SAID J. CHITEMBWE**

**JUDGE**