



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 76 OF 2012

REPUBLIC.....PROSECUTOR

VERSUS

JAMES KAHIGA KARURI.....ACCUSED

JUDGEMENT

Background

James Kahiga Karuri, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge read that on the night of 9th September 2012 at Gitiha Village in Githunguri District (*sic*) within Kiambu County murdered Peris Nyokabi Gaitho.

The deceased used to assist her mother Mary Wanjiku Gaitho, PW1, to run a bar known as Small World at Gitiha. She used to live in one of the rooms behind that bar and this is where her body was found lying on a broken bed on 10th September 2012. She was half naked from the stomach to the legs. The accused was arrested on suspicion of causing the deceased's death and was charged with murder. He denied causing the death of the deceased.

Prosecution case

The prosecution called a total of eight (8) witnesses. Mary Wanjiku Gaitho, PW1, testified that she left Gitiha on 7th September 2012 to go to her farm at Uplands. She left her daughter the deceased in charge of the bar known as Small World. She testified that the accused, who used to live with the deceased as man and wife but had parted at that time, called PW1 on 8th September 2012 and told her that he wanted to go for his family (referring to the deceased and her three children). PW1 told the accused to pay her compensation for having taken care of his family. The accused gave her Kshs 3,000 which PW1 said was not enough. The accused promised to bring another Kshs 1,000 on 9th September 2012 which he did. PW1 received information of her daughter's death on Monday 10th September 2012 from one Rosemary Njeri, another daughter of PW1's.

PW1 testified that she went to Uplands Farmers Choice where the accused worked intending to have the accused detained "**because he was implicated**". She did not find him at his place of work. PW1 decided to go to Uplands Police Station to report. She told the court that the accused called her while she was at the Police Station and told her about the death of the deceased and that he was going to commit suicide. PW1 said she persuaded the accused not to commit suicide. She said that she called one Mbuti, PW2, and told him to go to accused's home and stop the accused (perhaps from committing suicide or from escaping).

David Mbuthi Ngwandaru, PW2, testified that he received a telephone call from PW1 around 7.00am on 10th September 2012 and told to go to Nyambare to look for the accused **“because he was suspected of killing someone”**. PW2 did not find the accused at home but shortly thereafter the accused arrived at his home and met PW2. PW2 asked him why he was being sought. According to PW2, the accused told him that he (accused) had blundered. PW1 called the accused’s landlord Gitau, PW3. They arrested the accused and took him to Nyambare Petrol Station from where he was picked by a police motor. The accused was taken to the police station and was placed in police cells.

James Gitau Itotia, PW3, testified that on 10th September 2012 at 7.00am, the accused went to his house to pay him Kshs 30 he had lent him; that the accused told him that **“he did not want to go to heaven with debts”**. Shortly after the accused left, PW3 heard some commotion and went to find out what was happening; that he found the accused and PW2 pushing each other near PW3’s door. PW2 told PW3 that the accused **“was suspected of killing someone.”** PW3 called the Officer Commanding Uplands Police Station (OCS) and informed him. They were advised to take the suspect to the petrol station where the accused was picked by the police.

CPL Virginia Wanjiku, PW5, took photographs of the scene. She testified that the deceased was inside a single room used as a dwelling house by the deceased. PW5 said she observed injuries on the neck and that the body lay halfway on the bed and half way on the floor. She said the bed was broken from the lower side and deceased’s legs were protruding from the broken side of the bed and that the deceased had no pants although she was dressed. PW5 observed a loose cover on the bed cream in colour with visible stains on it suspected to be semen stains. At the scene were a 200 shillings note that was bloodstained; wet khaki paper and plastic containers under the bed. PW5 said further that there were cigarette butts at the scene, Farmers Choice card bearing the names James Kahiga and one Marvin hat black and white stripes recovered in the room and another Marvin hat grey and black recovered from the bar. PW5 took 40 photographs of the scene showing the outlay of the room and the position of the body. PW5 produced the report in respect of the photographs as exhibit one (1). I note that the photographs were not produced in evidence although they were identified in the evidence in chief and defence counsel cross examined on them.

CPL Francis Opankala, PW7, from Githunguri Police Station investigated the case. He confirmed to the court that he visited the scene at a bar called Small World and found that the deceased used to reside at the back of that bar. He said he found the deceased lying on a broken bed on the lower part. He observed that the deceased was half naked from the stomach down to her legs. He said that they found a folder inside of which was found an employment card bearing accused’s name (Ex. 3); Equity Bank Card in accused’s name bearing A/C No. 0690194234 (Ex. 4); NIF Card in accused’s name (Ex. 5) and electors’ card in accused’s name (Ex. 6) and Kshs 1,550 (Ex. 7).

The other witnesses are Joseph Keige Gaitho, PW4, brother to the deceased who identified the body to the doctor for purposes of post mortem examination; Dr. Joseph Maundu, PW6, who examined the accused and found him mentally fit to stand trial and Dr. Kizzy Shako, PW8, who performed the post mortem examination. PW8 testified on behalf of Dr. Johansen Oduor who was not available to give evidence. The examination on the body of the deceased showed swelling on both eyelids; multiple bruises on the neck; peripheral cyanosis (extremities had turned blue), bruised neck muscles; bruised vagina and bleeding from the vagina. The doctor formed the opinion that the cause of death was asphyxia due to manual strangulation.

Defence case

The accused testified on oath as DW2. He told the court that he used to live with the deceased as man and wife from 2007 to 2011 when the deceased started moving with other men. This led to their separation. He told the court that on 8th September 2012 he went to see PW1 to give her money for food for the deceased’s children. They discussed how the deceased and the children would return home (accused’s home). He said he went back home to prepare for his work shift which was starting at 12.00pm. He said he went to work until 8.00pm when he left work and went home to sleep.

His brother Bramwell Karuri Mureithi, DW3, told the court that he lived with his brother the accused and that on Saturday, the 8th September 2012 the accused left to work at 12.00pm; that the accused returned home at 8.00pm and slept; that on 9th September 2012 a Sunday the accused left home to take some money to PW1 and go to work and returned at 9.00pm and slept. DW3 testified further that on Monday, 10th September 2012 DW3 went to school but on coming back in the evening he did not find the accused at home. He said he later found the accused at the police station.

The 3rd witness for the defence is Elizabeth Waithera Oyiego, DW1, Government Analyst. She was testifying on behalf of Paul Waweru who has retired and unavailable to testify. She told the court that various items (cigarette butts, light green under pant, 200 shillings note, bluish marvin hat, grey with white and black stripes marvin hat, cream bedcover, pieces of paper, cream shirt, finger nails from accused and accused's blood sample) were taken to the Government Chemist Laboratory for examination to determine presence and origin of DNA. Of all the items presented, the report shows that only the cream shirt had light blood stains as per the report dated 8th October 2013. Of all the items profiled for DNA only the profiles from the cigarette butts matched the DNA of the accused found in his blood sample. The report prepared by Mr. Waweru Kang'ethe has unexplained anomalies as will be shown in this judgement.

At the close of the defence case, Mr. Kihang'a, counsel for the accused submitted that the prosecution has failed to prove the case against the accused beyond reasonable doubt. Counsel submitted that the evidence has inconsistencies and is insufficient to warrant a finding of guilt against the accused. Counsel took issue with the evidence of the prosecution that none of the prosecution witnesses placed the accused at the scene of the crime and that all the civilian witnesses were relatives of the deceased.

On the other hand the prosecution counsel Ms Magoma submitted that the prosecution has proved the case against the accused beyond reasonable doubt and urged the court to find the accused guilty of murder.

Analysis and determination

The offence of murder is committed when a person with malice aforethought causes the death of another person by unlawful act or omission. The prosecution bears the onus of proving murder beyond reasonable doubt.

The issues for determination by this court in this trial, as I understand them, are whether the death of the deceased occurred; whether that death was caused by the accused person before the court and if so, whether the accused had intended to cause that death. In other words, if the accused is the person who caused the death of the deceased, did he have malice aforethought?

Malice aforethought is defined under section 206 of the Penal Code and it includes an intention to cause the death of or to do grievous harm to any person whether that person is the one actually killed or not and 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.

There is no direct evidence leading to the accused as the person who killed the deceased. It is not disputed that the accused and the deceased lived together as man and wife and had separated at the time of this incident. It is not in dispute that the deceased was helping her mother run a bar at Small World in Gitiha and that she lived at a room behind that bar. It is not in dispute that the accused used to visit the deceased and spend nights in that room. It is not disputed that the room where deceased lived is the scene of this crime and that her body was found in that room.

What is disputed is the issue as to the person who killed her and whether that death was intended. The circumstances surrounding the death of the deceased do not come out clearly from the evidence presented to this court. There is no evidence showing that the deceased was seen at the scene on the day in question. There is no evidence as to what happened to the deceased before she met her death. All the evidence

touching on the accused as the one who killed the deceased was given by PW1, PW2 and PW3 as I have shown elsewhere in this judgement. PW1 said the accused called her to discuss how the deceased and her children would return to the accused's home. She said that after they met and discussed this issue, the accused left after giving her Kshs 3,000 and that after giving her the money, the accused said he would go for his 'family'. There is no evidence to show that he went to where the deceased worked. PW1 said that on Monday, 10th September 2012 the accused called her and told her of the death of the deceased and threatened to commit suicide. The phone records were not tendered in evidence to support the evidence that the accused called PW1. Rosemary Njeri, PW1's daughter who called her and informed her of deceased's death did not testify. The court was informed that Rosemary Njeri passed on. There was no other evidence of any other person regarding this issue.

On his part PW2 said that PW1 called him to go to accused's home and stop him because he was implicated in killing someone. He said that when he traced the accused, he (the accused) told him that he (the accused) had blundered. PW2 took this to mean that the accused had killed the deceased. PW2 said the accused had bloodstains on his shirt. PW3 also said that the accused's shirt collar was bloodstained.

With no direct evidence linking the accused on the murder this court will turn to circumstantial evidence. What does the law say about circumstantial evidence? In the cases of *Abanga alias Onyango v Republic Criminal Appeal No.3 2 of 1990* (UR) and *Musoke v. R [1958] EA 715* citing with approval *Teper v. R [1952] AL 480*, the applicable principles in respect of circumstantial evidence were set out as follows:

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

I have considered the evidence in its totality. This court is being asked by the prosecution to find the accused guilty of the murder of the deceased because the accused called the deceased's mother and told her he wanted to go for his family; that he called PW1 and told her that he wanted to commit suicide; that his personal items were found in the house where the deceased lived; that he told PW2 that he had blundered; that he paid his Kshs 30 debt to PW3 and told him he wanted to settle the bill because he did not want to go to heaven with debts and that his shirt collar had bloodstains.

In respect of the examination of the items found at the scene, I wish to state that I find the report prepared by Mr. Waweru Kang'ethe confusing. He says on the first page of that report that the 200 shillings note did not have blood stains but on page two of the report his conclusion and opinion is that **"The DNA profiles generated from the blood stain on the two hundred (Kshs 200) note (item PNG 5) and from the semen stain on the bedcover (item PNG 7) were partial profiles of two different unknown male origins."** This is again misleading because on page one of the report, it shows that **"The bedcover (PNG 7) was not stained with blood"**. There is no mention in his report as to whether this item, bedcover, has stains of semen. The witnesses who recovered the Kshs 200 note from the scene said it was bloodstained. The report says it was not bloodstained but the opinion is that the Kshs 200 note had bloodstains although the DNA profiles on it were partial and belonged to unknown male. The report shows that the bedcover was not stained with blood, yet all evidence pointed to the bedcover as being stained with what was suspected to be semen. The blood on the shirt was found with DNA of unknown female.

The only evidence that may seem to connect the accused to the scene is the DNA found on the cigarette butts found beside the deceased's bed. This matched the DNA found in the blood sample of the accused. This evidence taken together with the folder which contained an employment card bearing accused's name (Ex. 3); Equity Bank Card in accused's name bearing A/C No. 0690194234 (Ex. 4); NIF Card in

accused's name (Ex. 5) and electors' card in accused's name (Ex. 6) and Kshs 1,550 (Ex. 7) taken in isolation of the rest of the evidence seems to implicate the accused.

I have noted evidence by the defence that the accused used to visit the deceased at her residence and vice versa. The accused does not deny that those items belong to him and were found inside deceased's house. He explained that the deceased used to pick his clothes to wash them for him and that those items were carried together with the clothes. Even without this explanation, this court has taken into account that the accused used to visit the deceased at her residence and therefore finding cigarette butts at the bedside of the deceased where the accused used to spend time with her and finding his personal items in her house is not out of ordinary given the relationship they shared. I find the explanation offered by the accused regarding those items reasonable and plausible.

There is evidence of two marvin hats. No evidence was adduced to identify who was the owner of those hats. There is evidence from PW1 and the accused that the three children of the deceased were not sired by the accused although the accused said one child was his. This court recalls the evidence of the accused that the deceased used to move with other men and this led to quarrels and eventual separation between them.

I have also considered evidence by the accused's brother that corroborates what the accused had told the court that he went to work on 8th and 9th September 2012 at 12.00pm shift and would come home to sleep at 8.00pm on 8th September 2012 and at 9.00pm on 9th September 2012. His brother DW3 told the court that he left to go to school on 10th September 2012 and left the accused at home because he was to go on duty at 12.00pm.

Even if this court were to take it that there are circumstances linking the accused to the death of the deceased it is my view that these circumstances do not satisfy the principles laid down in the above cases mentioned above. Furthermore, it is my view that there are other co-existing circumstances that would weaken or destroy the inference of accused's guilt. These other co-existing circumstances are that there is a reasonable and plausible explanation as to how the cigarette butts and accused personal documents could have found their way into deceased's house. There is also no evidence that the accused was seen at the scene of this crime.

While this court empathizes with the family of the deceased for the loss of their daughter, I find that the evidence against the accused person is weak. It does not prove the case against the accused beyond reasonable doubt. The accused person is going to benefit from that doubt. At the end of this trial and after careful analysis of the evidence from both sides, it is my finding that the accused is not guilty of murder as charged. Consequently, the accused, James Kahiga Karuri, is hereby acquitted of the murder of Peris Nyokabi Gaitho. He is set at liberty forthwith unless for any other lawful cause he is held in custody. Orders shall issue accordingly.

Dated, signed and delivered this 2nd December 2015.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Magoma, prosecution counsel

Mr. Kihang'a defence counsel

Mr. James Kahiga Karuri, the accused

Mr. Daniel Ngumbi, court clerk