



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Case 72 of 2010

REPUBLIC.....PROSECUTOR

VERSUS

DAVID WAIHAKA NGANGA.....ACCUSED

JUDGMENT

By an information dated 9/7/2010, David Waithaka was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the charge state that on 25/6/2010 at Ndongino Village, Nyandarua District, he murdered Francis Kimotho Gakuo. He denied the offence. In support of their case, the prosecution called a total of eight (8) witnesses. Upon close of the prosecution case, the accused was called upon to enter his defence and he gave an unsworn statement but did not call any witnesses.

PW2, Irene Wacuka Maina, a neighbour to the deceased, testified that on 25/6/2010 at about 10.00 p.m., her husband arrived home and as she opened for him, she heard screams emanating from the home of Waithaka. The person screaming was telling Waithaka to stop beating him. She said Waithaka's home was about 30 metres away. She recognized the voice of the person shouting as that of Kimotho. The person screaming went on to say that if he died, it should be known that it was Waithaka who had killed him. PW2 said that the screams went on for long and she went back to sleep. She knew Waithaka and Kimotho to be good friends and that they used to drink and make a lot of noise. PW2 also said that Waithaka replied that Kimotho had abused that he sleeps with his mother. Next morning, when PW2 was going to get water at 6.00 a.m. she found somebody lying at her gate. She was not able to identify him, went back to the house, woke her husband up, got a torch and flashed at the person and found it to be Kimotho. PW2's husband informed the Chief of the area who in turn informed police. She did not immediately tell police what she heard in the night but went to write her statement on 27/6/2010 and recorded what she had heard.

Joseph Maina Gathoni, PW3, a resident of Ndongino recalled that he was in his house on 25/6/2010 at about 10.00 p.m. when he heard the deceased shouting that if he died it was Waithaka. Next day he was informed that the body of a person had been found on the road. He went there and found it to be that of Kimotho, the deceased. PW3 said he knew the accused since he was young but did not know the deceased well as he lived further away. He admitted that there were other people in the area by the name of Waithaka.

Isaac Kingori Mukundi (PW4) a farmer in Raicheri Nyandarua recalled that on 25/6/2010 about 4.00 p.m., he was at Ndongino when Kimotho, the deceased, called him from PW4's home. He used a bicycle to go to his house and he informed him that people would go there to cut trees. They left together for Ndongino, bought meat and went to drink in different bars because the owner of the bar where PW4 went

did not like the deceased because he used to make a lot of noise whenever he was drunk. He never saw the deceased again till the next day when he was informed of Kimotho's death.

PW5, Benson Kahara is a resident of Leshau Pondo and owns a bar at Ndongino. He testified that on 25/6/2010 about 7.30 p.m. he was at his bar, Stage bar, when Kimotho and Waithaka went there to drink which they did till 9.00 p.m. when PW5 asked all the patrons to leave because he wanted to close the bar. He said that the accused and deceased whom he knew as friends left the bar at the same time with other customers.

PW6, AP Cpl. Charles Macharia Kihoro of AP Post Ndongino was at the Post on 26/6/2010 when the Chief called and informed him that Kimotho had been murdered. He went to the scene with other Administrative Police Officers. While at the scene, Maina (PW3) informed him that he had heard Kimotho screaming the night before that if he died it was Waithaka. He went to Waithaka's house and the mother refused to allow him in. The police jumped over the fence, asked for Waithaka's house and were shown the mother's kitchen. Waithaka was not there but was found in another house in the home. In the house, PW6 found a wooden stick with blood stains (PEx.2) and the T-shirt that Waithaka was wearing which was blood stained and so was the black trouser that accused wore (PEx.4). He was arrested along with the said exhibits and handed over to Mairo Inya Police Station.

Lawrence Kinya Muthuri is a Government Analyst working for the Government Chemist. On 9/7/2010, he received a black trouser, yellow T-shirt, a piece of wood and blood samples of the accused and deceased. He analysed the blood stains on the stick, T-shirt and trouser and found that the DNA generated from the trouser and T-shirt matched the DNA profile generated from the blood of the deceased. The DNA generated from the blood stains on the stick matched the DNA profile of the accused.

PW8, Cpl. Pius Mutungi of Mairo Inya Police Station received instructions from the OCS on 26/6/2010 at 7.20 a.m. to proceed to Ndongino where he found the deceased's body. He interrogated witnesses including PW3, Joseph Maina who claimed to have heard screams by Kimotho who said if he died it was Waithaka. He rearrested the accused from the Administration Police and recovered the exhibits, prepared an exhibit memo form which he forwarded to the Government Analyst. He also drew a sketch plan of the scene (PEx.6).

The post mortem was conducted on 17/7/2010 by Dr. Frederick Kariuki (PW1) who upon examination of the deceased body found a cut wound on the left side of the forehead above the eye, a cut wound on left side of the forehead. Internally there was blood accumulation in the scalp tissue at the back of the head forehead. He formed the opinion that the cause of death was severe head trauma inflicted by a blunt object. He filled the Post Mortem report (PEx.1).

In his unsworn defence, the accused stated that on 25/6/2010, he did his casual jobs as usual and later went to the club at Mailiane. He drunk alcohol till 6.00 p.m. then went to Ndongino where he arrived at 7.00 p.m. He entered Stage Bar where Kimotho found him. They drunk together and left at 9.00 p.m. as the owner of the bar wanted to close. It had rained and as they walked home, he fell on a wire and got injured on his finger and face. Kimotho also fell and asked him to help get up. It was slippery and so he uprooted a stick from the fence and it got stained with blood from his hand. When helping Kimotho, Kimotho's blood spilled on his clothes. When near his home he asked Kimotho to spend the night but he insisted on going home. He said that during that week Kimotho had fought with somebody at the club. Kimotho had gone out for a call and accused heard him shout for help and he went to intervene. Next day, Kimotho went to hospital, was stitched and informed accused that his assailant had been arrested. The accused went to record his statement at Chief's office, the Chief and Administrative Police heard the case and the assailant was to pay Kshs.4,500/- to Kimotho. He was arrested after Kimotho's death but he denied that he had ever disagreed with him. They were good friends and had never disagreed.

I have considered all the evidence adduced by the prosecution witnesses, the defence, the elaborate submissions filed by Mr. Wambeyi, counsel for the accused and the response by Mr. Chirchir the learned State Counsel.

Nobody witnessed the murder of the deceased. This case turns on circumstantial evidence. In the case of **Rep. v Kipkering Arap Koskei App. 16 EACA 135**, the court said as follows of criminal circumstantial evidence:-

“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 guilt.”

The court will consider whether all the circumstantial evidence herein points at the guilt of accused and no other person.

I must start from the undisputed facts. The accused person does not deny the fact that on the evening of 25/6/2010, he was drinking alcohol with the deceased at Stage Bar which is owned by PW5, Kahara. PW5 confirmed that the accused and the deceased left together about 9.00 p.m. on 25/6/2010. The accused in his defence does accept that they walked home together that night and he reached him and left deceased to walk further on to his home. The question is whether the accused and deceased ever had a fight that night and whether they parted on the said night.

PW2 and PW3 told the court that at about 10.00 p.m., while in his house they heard the deceased, whose voice PW2 recognized, shouting that Waithaka should stop beating him and that if he died, it was Waithaka. PW2 said he knew the accused and deceased as best of friends who used to walk and drink alcohol together and used to make a lot of noise when drunk. She also said that she owns a shop and knew them well. She had known both accused and deceased for 20 years. She further added that the deceased was a happy person and would go about talking. That evidence was corroborated by PW4, Mukundi, who had met the deceased earlier in the day on 25/6/2010 and said that is the evening when they went to take alcohol at Ndongino, they parted because in the bar that PW4 went to drink, the owner did not allow the deceased in because he used to make a lot of noise when drunk. PW3 also testified to hearing the deceased shouting for help on the night of 25/6/2010 at about 10.00 p.m. and said that if he died, it was Waithaka. PW3 did not know the deceased well and did not know whose voice it was but PW3's evidence goes to corroborate PW2's evidence as to what the person shouting said. The question that begs is whether PW2 recognised the deceased's voice. In **Mbelle v R (1984) KLR pg 626**, the Court of Appeal laid down guidelines as regards the evidence of voice recognition as follows:-

“(a) The voice was that of the accused (in this case the deceased);

(b) The witness was familiar with the voice and recognized it;

(c) The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who said it.”

The test applicable to voice identification was also explained in the case of **Karani v Rep (1985) 290**, where the court held:-

“Identification by voice nearby always amounts to identification by recognition. However, care must be taken to ensure that the voice is that of the appellant, that the complainant was familiar with the voice and he recognized it and that there were conditions in existence following safe identification.”

In this case, PW2 was emphatic that she heard the deceased cry for help and say that if he died, it was Waithaka. She was familiar with the deceased's voice as a person she had known for over 20 years. The incident took place only about 30 metres from her house and it was in the quiet of the night at 10.00 p.m. She was not the only one who heard what the deceased said but PW3 too, heard. On the next morning, the deceased's body was found at PW2's gate, where the screams emanated from. I am satisfied that the evidence of voice recognition was reliable.

After a report was made to the police, APC Cpl Kihoro with other police officers went to the accused's

home and found him in one of the houses. Upon search of the house, they recovered a blood stained stick under the bed, the accused's yellow T-shirt and trouser too (PEx.2, 3 & 4). The Government Analyst, PW7, who analysed these exhibits found the blood on the accused's T-shirt and trouser to match the deceased's DNA while that on the stick matched that of the accused. The accused explained that deceased had been assaulted at the bar a few days before the 25/6/2010 and had received stitches and that on the night, he had fallen due to the slippery road and the blood must have gotten on his clothes when he helped the deceased get up. If indeed the deceased had been assaulted at the club before 25/6/2010, the accused would have raised that issue during the prosecution case by putting questions to PW5 or Cpl Macharia, PW6, whom he said presided over the assault case at the Chief's office between the deceased and the assailant. The accused did not even bother to name who it is that deceased fought with the club yet he claims to have written a statement at the Chief's office regarding the incident as a witness. I find the allegation that the deceased had been assaulted there before to be an afterthought and untrue. If it had been true, it would have been alluded to during the prosecution hearing and questions put to witnesses. It was sneaked into the defence and I dismiss it as an afterthought and untrue.

The post mortem was conducted by PW1, Dr. Kariuki, who found that the deceased sustained a cut wound on the left side of the forehead above the eye and another beside the left forehead and blood accumulated in the scalp tissues but no fractures. The Doctor found the injuries to have been inflicted by a blunt object. The cause of death was opined to cardio pulmonary arrest secondary to severe head trauma. Had there been stitched wounds on the deceased's forehead as the accused would have this court believe, the doctor who performed post mortem would have seen them and noted in the report. Besides PW4 and PW5 who saw the deceased before his death would have told the court the state in which the deceased had been in on 25/6/2010. The accused's account of how he came to have the deceased's blood stains on his clothes does not add up. I am satisfied that it is the accused who was with the deceased on the fateful evening, having left PW5's bar at 9.00 p.m. and at 10.00 p.m. PW2 and PW3 heard the deceased shouting for help. It must be the accused who inflicted the injuries on the deceased. The police found a blood stained stick under accused's bed but the stains thereon did not belong to the deceased but instead on the accused. The court cannot tell how the accused's blood came to be on the said stick, he may have been injured during the incident too.

The last question is whether the accused possessed the necessary malice aforethought required to prove a charge of murder. PW2 and PW3 heard the deceased scream severally and from the injuries found on the deceased, it is obvious that the deceased was not struck once but severally. Most of the injuries were inflicted on the head meaning that the assailant intended to cause the deceased grievous harm or death. The injuries alone do go to show that the accused possessed malice aforethought or intention to cause grievous harm or kill the deceased.

In the end, I am satisfied beyond any doubt that the circumstantial evidence on record points to none other than the accused as the one who murdered his friend Kimotho. He is found guilty as charged and is hereby convicted of the offence of murder under **Section 203** as read with **Section 204** of the **Criminal Procedure Code**.

DATED and DELIVERED this 10th day of May, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Chirchir for the State

Ms Wanjiru holding brief for Ms Kahinga for the accused

Kennedy – Court Clerk