



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO.1 OF 2008
REPUBLIC PROSECUTOR
VERSUS
DAVID KAMAU THUTHO ACCUSED

JUDGMENT

DAVID KAMAU THOTHO (the accused) is charged with murder contrary to section 203 as read with section 204 of the Penal Code, that on 23rd December 2007 at KWA HARAKA TRADING CENTRE, NYAKIO LOCATION, Nyandarua South District, he murdered MWANGI WAINAINA KIRICHU (hereinafter referred to as the deceased).

The accused who was represented by Mrs. Keriri, denied the charge. At the onset, Mr. Gumo prosecuted the matter, later on Mr. Njogu took over, then Mr. Nyakundi, and finally Mr. OMari – all from the DPP's office.

The trial commenced before Koome J, who later left the station and Ouko J took over and heard the matter De Novo to completion of prosecution case. The latter was appointed to the Court of Appeal in the year 2012 and on 16/04/2013, I took over the matter to hear the defence case. Part of the delay in this matter is that the defence counsel was on maternity leave from December 2012 to March 2012.

The other contributor to the delay is that after it proceeded to hearing in April, I embarked on hearing four election petitions in Bungoma between May 2013 – September 2013.

The accused and deceased were friends who often shared alcoholic drinks and meals. On 23/12/2007 they had eaten roast meat together with other men, at a butchery belonging to JOSEPH THIGE (PW1).

Later on they teamed together with **NANCY WAITHERA (PW6)**, at KAKA BAR, shared drinks, then they all left for her home to have lunch which PW6 was to prepare. PW6 left them inside the house, to go to the shop and on her return she found the pair arguing over a lost phone. The accused claimed that the deceased had stolen his phone, so, he blocked the door with a stone, saying no one would leave the house unless the deceased produced the phone. Accused then left. PW6 sent one Joyce to report the incident to police. Eventually, PW6 left the house to go and seek help from police, but while still at the police station, one Kiiru reported that accused had stabbed the deceased.

According to PW6 the deceased went his own way. It was her evidence that both the accused and the

deceased were moderately drunk.

PW1 who later saw the accused alone, about 20m away from the butchery, testified that, accused was sharpening a knife on the wall. He later learnt that the deceased had been killed.

PHARES KIIRU (PW4) was within Kwa Haraka Estate at Kwa Mayor's Hotel, when he saw the accused, Waithera and the deceased walking – in fact accused and deceased were staggering while Nancy walked in between them. He saw the accused removing a knife from his waist area, move towards the deceased, and stab him on the side of the stomach. The deceased (who was also known to PW4), fell down, bleeding from the stomach, the accused ran away.

He is categorical that he witnessed the incident, as he was only 7 metres away. He saw PW6 walk away after the incident. He then reported the matter to police. He explained that the two caught his attention because of the deceased and accused's drunken gait.

Among those whose attention was drawn by noises at the scene was James Kariuki (PW2) who rushed to the scene, only to find the deceased lying down with a stab wound on the abdomen. His evidence is that the scene was outside a shop known as Tumaini but the shop was closed.

Samuel Wainaina (PW3), a son to the deceased received information about the incident. He went to the scene and saw his father who lay dead with a cut on the finger and chest.

The deceased's body was identified by **Paul Waruhi Ngugi (PW5)** his brother-in-law, for purposes of post mortem examination being carried out. He observed injuries in the mouth, stab wound on the chest and injury on the palm.

PC Josephat Muchemi Mwangi (PW8) of Haraka Police Station confirms that one Joyce Wambui reported to him at about 3.00 p.m. that Nancy Wamaitha had been locked inside her house along with the deceased. PW8 instructed Joyce to go back and try to open the door. Thereafter Nancy arrived and while making the report, they heard screams outside. A huge crowd had gathered around the deceased who was lying down near the shop with a stab wound on the chest.

He visited Nancy's house where he found two big building blocks, the door had been broken, but inside the house appeared okay. The accused was brought by a crowd of people, along with a blood stained knife. Both the knife and the deceased's blood-stained clothes were produced in court as exhibit.

Blood samples of the deceased and the recovered blood stained knife and clothes and accused's blood submitted to the Government Chemist for analysis. Henry Kiptoo Sang (a Government Analyst) found that the deceased belonged to blood group A. The knife was slightly stained with human blood group A, and the shirt was heavily stained with blood group A.

The post mortem examination carried out by Dr. Joseph Ndungu confirmed a stab wound and fracture of ribs. The stab wound extended to the spine, and in his opinion, the cause of death was penetrating chest injury from a stab, causing perforation of the heart.

In his unsworn defence, the accused states that he was at Haraka Trading Centre, where his motor vehicle was being repaired and after a while, he went to Pumzika Butchery where he ordered for meat. He then returned to the garage to follow-up on the repairs. At about 10.30 a.m., while returning to the butchery, he met two friends who joined him and he invited them to share in eating the meat. At the butchery's door, he met his long-time friend, Joseph Mwangi Wainaina, whom he also invited to join him in the meat eating. The four-some parted ways outside the butchery and the accused walked back to the garage. He then called Joseph Wainaina and the pair got into Kaka Bar where they ordered for alcoholic drinks and consumed the same.

The accused kept slipping in and out of the bar to check on the motor vehicle repairs and at some point he met Waithera who asked whether he had seen Wainaina. He told her Wainaina was inside the bar and she

joined accused, then went to speak to Wainaina. Joseph Wainaina, Waithera and accused left the bar in the company of one individual who wanted to hire the accused's motor vehicle. They all went to Nancy Waithera's house. The accused received a call from the mechanic who said he had discovered another defect in the motor vehicle. He left the house, leaving Waithera, Wainaina and the intended customer (referred to as Mzee Brother).

Later on, one Mzee Suna and Mzee Njogu approached him, saying that accused was required at the police station over issues to do with Waithera and Mzee Brother. He obliged, only to get there and be locked up on grounds that he was a thief and that if they failed to get Mzee Brother who had been in his company, then he would have to bear the cross. That is how he ended up being charged with the death of the deceased.

It is not disputed that MWANGI WAINAINA KIRICHU died on 23rd December 2007 at Haraka Trading Centre, and that earlier on he had been in the company of the accused and Nancy Waithera. It is also not disputed that he had a penetrating stab wound on his chest, which led to the death. The issue for determination is:-

- a. Who inflicted the injury?
- b. What was the motive?

The defence counsel (Mrs Kereri alias Miss Njagua) submitted that there is a contradiction in the prosecution case regarding the circumstances surrounding the death, because whereas PW4 claims to have witnessed the actual killing which was committed as the deceased, accused and Waithera walked together, Waithera (PW6) and Cpl. Muchemi (PW8) say the death occurred when the former was at the police station and she only got to learn of it from a report made by PW4.

She further argues that there wasn't a single stain of blood matching that of the deceased, found on the accused's clothes, and this creates doubts as to whether accused is the one who stabbed the deceased.

Counsel submits that the evidence is not sufficient to link accused to the offence, saying the investigations were not properly carried out. She points out that although PW4 claimed that the accused was apprehended by one Kariuki as he tried to flee from the scene, the said Kariuki was not called as a witness. Secondly:

2. That the recovered knife was not dusted for finger prints.
3. That although PW4 insisted PW6 was present during the killing, the latter has denied this and in any event PW4 was not asked to identify the murder weapon in court, yet he was the only eye witness.
4. Counsel relies on the case of R V Jackson Mburu Kamau Criminal Case No.42 of 1999, which quoted the celebrated case of **Kipkering arap Koske V R (1949) 16 EACA 13** regarding principles to apply when a case is based on circumstantial evidence. That decision stated that:
 - a. The inculpatory facts must be incompatible with the innocence of the accused.
 - b. They must be capable of no other conclusion or explanation except the guilt of the accused.

On the basis of this decision, counsel argues that prosecution has failed to prove that the accused was directly linked to the deceased's death.

The argument by the defence is that, since all the prosecution witnesses described the accused and the deceased as good friends, there is no way the accused could have had the intention of murdering his close friend. She urges the court not to convict the accused on mere suspicion, saying prosecution has not sufficiently discharged the burden of proof as:

- a. There was no premeditation.
- b. Malice aforethought was not established.

When the day began, the accused and defendant were on their usual friendly terms and even shared a meal at a butchery courtesy at the accused's generosity. They then went to Waithera's house for more eating. This version is consistent both in the prosecution and defence case. It is what happened after the "visit" to Naomi Waithera's house which is contested.

According to PW6, the accused claimed he had lost a phone and the only suspect was the deceased, because she had gone to the shops, leaving the pair inside the house. So incensed was the accused by this loss, that he vowed not to let anyone out of the house until the phone was recovered. He blocked the exit using stones. It is confirmed by PW8 that a lady by the name Joyce went to report that the pair had been blocked from exiting the house. However Joyce was not called as a witness to confirm this. Whatever the case, it seems that at least the two did eventually leave the house, although it is clear as to whether they left together or separately.

What would provide motive for the incident then is the loss of the accused's phone.

Did the accused thereafter go to the garage to check on his car? Although this is what he claims, there is the evidence of **Joseph Thige (PW1)** who saw the accused near the butchery at about 1.00 p.m. he was sharpening a knife on a wall. This is the same knife which was recovered with blood stains that matched the deceased's blood group.

The knife was handed over to police by a member of the public. I doubt that dusting of the knife for finger prints would have achieved anything considering that it had already been handled by a third party.

Did PW4 witness the accused draw a knife from his waist region and stab the deceased or did he make up the whole story? PW4 said his attention was drawn to the two because of the deceased and accused's gait. They were both drunk, to the extent that they staggered as they walked. The fact of their drinking is confirmed by accused himself, PW6 (although she says they were moderately drunk) and PW8 who arrested the accused and say accused was VERY drunk. According to this witness, the accused stabbed the deceased on the side of the stomach and the latter fell down.

The Doctor's report found the stab wound was on the left side of the chest between the 4th-5th ribs causing perforation of the heart. This is what the defence counsel capitalises on to say there is contradiction in the prosecution case. My own view is that the positioning of the 4th and 5th ribs are such that a lay person would not necessarily refer to that position as chest – it is the lower chest cavity and almost touching the upper abdomen. That variance alone cannot justify concluding that PW4 did not witness the incident.

Then there is the issue as to whether the absence of the deceased's blood on the accused's clothes absolves him from the act. I think that is being too general. There is no evidence suggesting that the pair got into a physical engagement so as to warrant blood from the deceased, staining accused's garment.

How is it that PW4 saw the exact company which had been in Waithera's house, walking past the place he was seated? I think it is Nancy Waithera who is not being truthful. If Joyce, (upon her return from the police station) opened the door for them, why was she still going to the police station, yet her aim had been to get police to intervene because accused had blocked them from leaving the house?

She confirmed on cross-examination that after blocking the house, she did not see the accused – so what was the purpose of going back to the police station?

I think what happened is that accused blocked the door and left – that is when he went to get the knife which PW1 saw him sharpening. He returned to find both deceased and Waithera outside the house and joined them and as they walked together, he stabbed the deceased. Nancy walked away as she did not want to be involved – maybe she did not realise that the stab had resulted in death and that is what surprised her, when PW4 made a report at the police station – it was not that she wasn't aware of the

stabbing.

The last issue is whether the failure to call Kariuki as a witness is fatal to the prosecution case. There is no evidence that Kariuki witnessed the stabbing, indeed according to PW4, he was alone when the incident occurred. A crowd milled once the deceased had fallen and Kariuki tried to flee. I am unable to detect what adverse evidence Kariuki would have given against the prosecution, after all, he is not even said to be the one who recovered the knife from the accused. His defence is carefully crafted to avoid accounting for his actions. I don't believe him and I reject it.

Consequently my finding is that accused deliberately purposed to harm the deceased and left the house where they were, went and sharpened the knife and returned to find the deceased and stab him. This was not a reaction in the heat of the moment, his action was intended to cause grievous harm to the deceased.

The evidence sufficiently proves the charge and accused is found guilty of murder.

Delivered and dated this 8th day of November, 2013 at Nakuru.

H.A. OMONDI

JUDGE