



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL CASE NO. 9 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE MWANGI KABIRA.....ACCUSED

JUDGMENT

1. **JOSPHAT MAINA KAMURA** (deceased) was in his lifetime a head master at Tetu School in Mwireri village in Laikipia County – He was quite enterprising because apart from being a headmaster he had a pub, which he operated, called “New City Bar.” He also operated a public service vehicle which was named “Busy”. Some of the people referred to him by his nickname “Busy” while others referred to him as baba John. John was his son.

2. The deceased employee, Purity Nyaguthii Kabiri (PW 5), stated that on 27th June 2012 her employer “Busy” arrived at the pub and greeted everyone. After inquiring from PW 5 whether all was well he left. PW 5 said the deceased was escorted by another employee Lucy Nyambura. PW 5 said that the deceased declined to use his motor cycle, that night, because it had rained heavily. On the way he passed by another pub called “Lovely” and greeted its owner Priscilla Kareamuta (PW 7).

3. Samuel Mwangi Kibata (PW 1) on that same night at 10.00 p.m. went toward his shamba (farm) with a view to tie his cows for the night. Before reaching there PW 1 heard deceased speaking to himself. PW 1 recognised him by his voice. PW 1 was of the view that the deceased was drunk. Not long thereafter a motorcycle approached the deceased. The rider stopped and offered the deceased a lift. PW 1 could not see the rider because it was a dark night but PW 1 did note that there was more than one person on that motor cycle. Deceased accepted the lift and the motor cycle rode past PW 1. Not long after PW 1 had entered the shamba he heard screams. The screams were first of a man then of a woman. PW 1 was to learn later that the woman who screamed was the lady who lived near where deceased was attacked.

4. PW 1 persuaded a neighbour called Ngatu to go with him where the screams were coming from. On reaching that place they found deceased. The deceased was bleeding profusely from the head. PW 1 inquired what had happened and this is how PW 1 narrated the deceased’s response:-

“..... deceased said that he had been given a lift. He said that he was cut by boys of Maili sita (deceased) said one was husband to Grace.

5. Samwel Gachanja Kanaki (PW 2), a neighbour of the deceased, also responded to the screams. He went on the scene and shone his torch on the deceased. Deceased recognised him. When PW 2 asked deceased who had attacked him deceased said it was Grace.

6. PW 1 and PW 2 and many other people who gathered at the scene did not know who Grace was.

7. Police were summoned and when they arrived they took deceased to hospital. He died while receiving treatment.
8. The prosecution called a total of 14 witnesses, including the doctor who performed the post-mortem. Out of all those witnesses none knew who Grace was or who was Grace's husband. More importantly none knew the accused who were before court.
9. The doctor who performed post-mortem found the deceased had multiple skull fractures. Deceased was found to have cut wounds to the right hand 2cm long, on index finger and at the palm of that hand near the thumb. These injuries according to the doctor were more probable to be defensive wounds.
10. Deceased also had cut wound on the right thigh 6 cm long and 10 cut wounds on the head, ranging from 5-7 cm long. Three of those wounds caused skull fractures.
11. Deceased also had 3 cm long stab wound at the back of the neck. Those caused injury to the spine. The vessels and nerves were cut. The spine had mild bruising.
12. The doctor opined that the cause of death was haemorrhage with cervical injury secondary to sharp trauma.
13. The court received the evidence of Grace Warugu Mwai, following a ruling of a trial within a trial. That ruling was in respect to the objection raised by learned counsels for the accused, that Grace Warugu Mwai (Grace) was a wife of the 1st accused and accordingly was not competent to testify against 1st accused. The court by its Ruling on 2nd August 2017 ruled that Grace was a competent witness in the trial.
14. Grace's evidence was not clear. She stated that on some days before the death of deceased her husband George Mwangi Kabira (the accused) asked her for her cell phone but because she could not put in its pin number, because it was malfunctioning, accused assaulted her and she ran away to her parent's home. Grace denied that her disagreement with accused was due to the deceased phone call that he had made on Grace's cell phone. She however after being cross examined, did accept that accused assaulted her after asking her about a teacher but that accused did not identify the said teacher.
15. The court, after prosecution concluded with its evidence acquitted two other accused. The accused was put to his defence.
16. The accused was put to his defence to the charge of murder. He was charged with the murder of Josphat Maina Kamura deceased.
17. Accused denied the offence of murder. He said in the night in question he was at home alone since his wife Grace had returned, with their two children to her parent's home.

ANALYSIS AND FINDING

18. I will begin my analysis by referring to the standard with which this country conducts criminal trials as stated by Justice John M. Mativo in the case **JOSEPH NDUNGU KAGIRI v REPUBLIC [2016] eKLR** viz:-

“In our jurisprudence an accused is presumed to be innocent till proven guilty, the accused is entitled to fairness and true investigation and the court is expected to play a balance role in the trial of an accused person. The court is the custodian of the law.”

19. The prosecution failed to thoroughly investigate this case. As rightly stated by the learned counsel for the accused there must be countless number of people who have wives called Grace. Since the dying declaration of the deceased, was that it was Grace's husband who attacked deceased, that single evidence against the accused was indeed very very weak. There can be no justification to convict the accused simply because his wife's name was a Grace. If that was to be so then one could convict many people, whose wives are called Grace, for the murder of the deceased. That would go against the cardinal principle of law very well stated in the case **REPUBLIC v DAVID RUO NYAMBURA & 4 OTHERS [2001] eKLR** as follows:-

“It is our cardinal principle of law that in a criminal case the legal onus is always on the prosecution to prove the guilt of an

accused person, and the standard of proof is proof beyond reasonable doubt. The burden of proof therefore lies on the prosecution throughout to prove the guilty of an accused.

It is provided in section 107 of the Evidence Cap 80 as follows:-

“107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those fact exists.

(2) When a person is bound to prove the existence of any fact it is said the burden of proof lies on that person.”

An accused person does not assume any burden to prove his innocence in a criminal case. He is obliged only, if he so wishes, to given an explanation or to raise a defence to the charge, which is probably or possibly true. If he does this, then he discharges his burden of proof and his explanation or defence must be accepted.”

20. The prosecution failed to meet the standard of proof, beyond reasonable doubt, against the 1st accused. Accordingly George Mwangi Kabira is hereby acquitted of the charge of murder. He is set free unless he is otherwise lawfully held.

DATED AND DELIVERED AT NANYUKI THIS 2ND DAY OF NOVEMBER 2018.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Mariastella

Accused:

For Accused

For the State:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE



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