



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 15 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL MWANGI CHEGE.....ACCUSED

JUDGEMENT

1. Daniel Mwangi Chege, the accused person herein was charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya.

The particulars of the offence are that between the 6th and 14th Day of August 2014 at an unknown time in Allangho Arba within Garissa County with others not before Court, they murdered **Lawrence Oluoch Ogoro**.

2. The prosecution called eight (8) witnesses in support of its case while the defence called one (1) witness.

2. The prosecution case in brief is that the deceased, the accused and one other person not before court worked together at a mining site in Allangho Arba about 40 kms away from Garissa. The deceased and one other worker buried some oil when the machine for excavation stalled. After the repair of the machine in Nairobi the same was returned to start operating but the hidden oil was not found. The deceased who was the site manager was tasked by their employer with investigations however soon thereafter he disappeared and the remains of his body found after several days. On the day the deceased disappeared he left the site in the company of the accused but did not return. Several days thereafter some herders came across remains of a human body and reported. Investigations were carried out. At the scene there was a shallow hole, a hip of soil which had been excavated as marks of an excavator could be seen. The accused was last seen with the deceased and is the suspect.

4. On his part the accused denied the allegation stating that he had no reason to have killed the deceased.

5. PW1 Festus Mulwa Mutungi testified that together with his partners they operate Bora Mineral Products a Mining company conducting mining activities in Allangho Arba in Garissa County. At the mining site they hired four employees, the deceased Lawrence Oluoch, herein who was the supervisor, the accused Mwangi Chege, Mwendwa as machine operators and Said Dagane, a watchman.

On or about July 2014 their excavator broke down and was taken to Nairobi for repairs. On site there were 400 litres of diesel and the deceased and Mwendwa hid the oil, by digging and burying the same. The excavator was taken to Nairobi for major repairs and returned on 2nd or 3rd August 2014. It still had mechanical problems and the witness had to bring a mechanic on 5th of August 2014.

He was informed when the machine was returned that the diesel was missing. Mwendwa and the accused had reported to the work site first followed by the deceased. When he arrived on the 5th of August he spoke to the deceased on phone and asked him to investigate the loss. However, the deceased had not made known the investigations because he went missing immediately thereafter.

The witness went to the site on 7th August 2014 where he found the accused and Mwendwa. He asked the whereabouts of the deceased and was informed that together with the accused they had proceeded to collect another excavator from a neighboring site but the accused had come back alone.

On asking the accused the whereabouts of the deceased the accused informed him that he had left the deceased at the main road and proceeded to pick the excavator and on return he did not find him.

6. The witness proceeded to Nairobi and returned to Garissa on 14th of August 2014. He went to the site where he found Ahmed Bille, a village elder and two watchmen. They informed him that they saw torn clothes resembling those of the deceased. He proceeded to the scene

where he found pieces of human body and tattered clothes. The scene was also disturbed like someone had dug a hole. They reported to the police who also proceeded to the scene.

7. In cross-examination he told the court that the site is located in an isolated area. The nearest mining site from theirs is 500 meters away. Vegetation is semi-arid, and there are wild animals. It is sparsely populated; human settlement was about 2 Km away. He decried the deceased being killed by wild animals as he had not heard of such an occurrence.

8. PW2 Emily Adhiambo Omolo, a widow to the deceased testified that she was with her husband in the Month of June 2014 at their home in Athi River. That the deceased at the time informed her that the excavator was faulty. The deceased was recalled to work by PW1 on 3rd August 2014 and travelled to Garissa on 4th August 2014. On 5th August 2014 the deceased called her and informed her of the missing fuel. The deceased allayed his fears to her over the issue specifically that he had tried to resolve the issue with PW1 and the accused but they had failed to reach an understanding.

On 6th August 2014 she tried to call the deceased but could not find him. She then called Mwendwa who informed her that the deceased had left his employment at which point she asked for PW1's number and called him. PW1 who informed her that he had sent the deceased and the accused to another site to bring an excavator mower but the deceased had not returned back.

9. Upon consultations with their relatives, she reported the matter to Athi River Police station which circulated the information of a missing person. On 14th August 2014 PW1 informed her that he had reported the matter to Garissa police station. She travelled to Garissa on 15th of August 2014 and the following day she was taken to the scene and shown where the deceased was buried in a hole. She was later taken to the mortuary where she identified the deceased body parts and his torn clothes. A DNA was conducted from the blood samples of the deceased and their son MO. The the DNA confirmed that the body parts were for the deceased.

10. PW3 Paul Onyango Ogolla, a brother to the deceased, corroborated the evidence of PW2. He was with PW2 when they reported a missing person at Athi River police station. He was also present when the body parts of the deceased were identified, he recognized the deceased from the toes.

11. PW4 George Okuku Odongo, brother to PW1 and one of the Partners of the mining Company testified that the first time he met the accused was on 7th of August 2014. While engaging in talks with the workers, he learnt that the accused had differences with the deceased as the accused alleged that the deceased practiced witchcraft and the accused claimed to be praying to ward off evil spirits. He tried to solve the issue. They then left the site on the same day and proceeded to Garissa; the accused escorted them to Garissa to buy oil for the excavator. He was aware of the disappearance of the diesel. They had held both the deceased and the accused accountable but the deceased agreed to be deducted the amount owing in his monthly wages.

He told the court further that he did not see the deceased at the site and his phone was also unanswered.

In cross examination he denied eliminating the deceased because of the oil, as he had agreed to the deduction of his wages.

12. PW5 Jemima Sangari Kurabu a public health official confirmed accompanying her supervisor to the scene of crime. She testified further that at the scene they found the remains of flesh and clothes which they placed in a paper bag and took them to Garissa General Hospital. They also found an ATM card and G Coach bus receipt.

13. PW6 John Misoi testified that in the year 2014 he was based at Garissa Police station in Crime section. He recalled that on 15th August 2014 a person named Mulwa reported a case of a missing person. Mulwa informed the police of pieces of clothes recovered at Alangho Arba and that the missing person was said to be a supervisor at an excavation site.

The OCS directed that the person who reported be detained pending further investigations. The next Morning, the witness sought for an exhumation Order from the court, which was granted and they proceeded to the scene with the reportee together with other CID officers. On arrival, they recovered pieces of torn clothes scattered; torn trousers, torn sports shorts, a torn t-shirt, and a belt. Inside the trouser, they found a wallet containing an identity card. ATM card and a bus ticket. In the surrounding area, they recovered human body parts; nails, body hair, broken ribs.

They did not have to dig to recover the items nor did they find any disturbed part of the earth. They also established that the person went missing on 6th August 2014 and that on 14th August 2014 a group of camel herders found pieces of clothes and they reported to the watchman on the site which prompted the report to the police.

The body parts were taken to Garissa PGH Hospital. On 19th August 2014 after tracing the relatives of the missing person they conducted a forensic post mortem in the presence of the deceased wife and brother.

In cross-examination he conceded that the route to Modicar- Dadaab has wild animals. He suspected that the deceased was devoured by wild animals as he saw hyena faeces at the scene. The scene was 600 to 800 meters from the excavation site and across the road. The deceased had at the time been missing for nine (9) days.

14. PW7 Corporal Simon Njogu, of DCI Office Central Nairobi and formerly DCI Garissa on his part testified that on 15th August 2014 upon the instructions of the DCIO a team visited Alongho Alba 40 Km away from the station. On arrival, they were taken through the gypsum mining site, where they met the accused and learnt that another machine operator was missing. There was Festus a supervisor, who took them round the site accompanied by Daniel.

They went to where the excavator was parked. They saw fresh markings of the movement of the machine in the bush (100 meters away). After following the marking, they discovered a hip of fresh soil, like one used to bury a body. Upon searching the area, they recovered human remains (body) near the hip of the soil. With the health officer, they put the remains in the bag.

They interrogated and arrested the accused person and his colleague for investigations. The remains were placed in PGH morgue for forensic testing, DNA was conducted at PGH by Dr. Njoroge a pathologist. The report was positive that they were human remains.

Further it was his testimony that the deceased was hit using the excavator machine and only the accused knew how to operate the machine.

15. In cross-examination he told the court that investigations revealed the deceased was killed and they suspected deceased was killed using the excavator machine. From interrogating the accused they learnt they had differences with the deceased. They suspected that the deceased was killed by the machine but the report does not show the cause of the death.

16. PW8 Dr. Julius Kipkenda, a medical officer a colleague of Dr. Njoroge and who is conversant with the signature and handwriting of Dr. Njoroge, who carried out the forensic investigations. He told the court that the that his colleague was to ascertain whether the parts were of a human being; and the cause of death.

He produced the postmortem report as **P Exh 1 & DNA report as P Exh 2**.

The report confirmed that the parts were for an adult human being and cause of death unknown.

17. In cross-examination he restated that the cause of death was unknown and the possibility the death may have been caused by wild animals. The fracture of the rib could be antemortem, perimortem and/or post-mortem.

18. At the close of the prosecution case the accused was found to have a case to answer. He gave an unsworn statement as follows:-

DW1 Daniel Mwangi Chege the accused testified that he was summoned by CID officials while he was at the mining site. They took him to the scene where they found scattered clothes and human remains. They informed him that they were investigating and he was kept in custody for 14 days. He was placed in custody for 3 months and later charged with the offence of Murder.

That during the investigation, the CID officers informed him that they had witnesses who linked him to the murder of the deceased. He had worked at the site for three (3) weeks. He denied being involved in the murder of the deceased. He denied having any business and/or relationship with the deceased.

He conceded to operating the excavator and stated that the same had been hired from Nairobi.

Submissions

19. On 21st of November 2021 at the close of the defence case, the court directed the accused person's counsel to file his submissions on or before 26th of January 2022 and the prosecution to file theirs thereafter. At the mention of the matter on the 26th of January 2022, only the submissions by the state were on record, the court invited Counsel for the accused to file submission the delay notwithstanding. At the time of writing this judgement, defense counsel had not handed in his submissions.

20. The prosecution submitted that the accused was the last person seen with the deceased. That the deceased went missing after presenting the report on the missing 400 litres of diesel. Further evidence showed that the heap of soil at the scene had been placed by an excavator since there were clear marks of the excavator shovel. That there were also traces of the excavator chain marks heading to the scene.

Analysis and Determination

21. For the Prosecution to secure a conviction on the charge of murder, it has to prove three ingredients against an Accused person. In **Anthony Ndegwa Ngari vs Republic [2014] eKLR**, the elements of the offence of murder were listed as follows: -

- (a) the death of the deceased occurred;**
- (b) that the accused committed the unlawful act which caused the death of the deceased; and**
- (c) that the accused had malice aforethought.**

22. In this case the death of the deceased is certain. He disappeared on the 6th August 2014 and his remains found on 14th August 2014. The cause of death was not ascertained. In a forensic pathology and anthropology report compiled and submitted by Dr. Njoroge (Exh2) the same stated as follows with regard to the cause of death;

“ 8.1. The cause of death is uncertain. However, the rib has an opaque fracture on the medial side suggesting trauma. However, based on morphology alone, it is impossible to say if the fracture was antemortem, perimortem or postmortem. Histological examination of the rib is thereof required.

8.2. The fact that only a few biological remains were recovered suggests either recovery was not complete or that the remains were scavenged by wild animals. It would help if the pathologist visited the scene of the recovery.

8.3. The tattered and shredded clothing suggested wild animal involvement. However, it is not clear if this occurred before or after death.”

23. Whether the accused committed the unlawful act which caused the death of the deceased was solely based on circumstantial evidence. The prosecution has led evidence that the accused was the last person seen with the deceased, that there was evidence of disturbance of ground at the scene which they attribute to the excavator shovel. They also seek to present motive from the relationship between the accused and the deceased and the fact that there were pending investigations over the missing 400 litres of diesel.

24. In **Abanga alias Onyango v R Cr. App. No 32 of 1990**, the Court of Appeal set out the test that would be necessary in a case based on circumstantial evidence as follows:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (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 the 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.”

Charles Mathenge Mwangi & Another –Vs- Republic CA Case NO. 72 OF 1997 (unreported), (OMOLO, TUNOI JJA and RINGERA Ag. JA) held:

“The answer must be that in a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge”

In the case of **David Munyui Chiragu & Samuel Mungai Nganga (2021) KECA 342 KLR** the Court of Appeal quoted several cases including of **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR** where the said court had stated; -

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: - ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

25. The court has considered the fact that the cause of death has not been conclusively attributed to an injury occasioned prior to the death of the deceased. However, there is evidence of heaped soil where the remains were found. PW7 testified that there were fresh markings on the excavator that led them to the site a few meters away. Meaning that an excavator was used to dig the soil. PW2 saw a hole near the heap meaning that the soil had been dug from the hole. It is said that there is a possibility that the deceased was mauled by animals but it is not clear whether this was before death or after death. As the animals may have dug the remains in the shallow hole/grave the deceased was buried in.

26. It is telling though that the excavator on site had fresh soil and there were excavator marks from the site of mining to the place the remains were found. The other mining site was far and there were only two machine operators on this site. The question to ask is who excavated the heap of soil? why? And was the deceased buried there before the animals unearthed his remains?

27. The accused does not deny that he left the site in the company of the deceased to collect an excavator; he was the last person to be with the deceased. On interrogation he stated that he left the deceased on the road. He failed to explain why he did so. He does not even say either whether he went with the deceased to collect the excavator or not. He simply appeared to be nonchalant towards his work mate who disappeared.

28. In **R Vs EKK (2018) eKLR**

Lessit J in considering the doctrine of the last seen with deceased alive stated: -

“Regarding the doctrine of the last seen with the deceased. I will quote from the Nigeria Court case of Moses Jua Vs the State (2007) (PELR – CA/11 42/2006.

The court while considering the last seen doctrine held:

“Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased.” (Emphasize added)

In David Munyui Chiragu & Samuel Muigai Nganga Versus Republic (supra) the court of appeal also considered the last seen theory and equally quoted a Nigerian case Stephen Haruna V. The Attorney-General Of The Federation (2010) 1 iLAW/CA/A/86/C/2009 where the court opined thus:

“The doctrine of "last seen" means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus, where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

29. Sections 111(1) and 119 of the Evidence Act spells out a statutory rebuttable presumption as follows:

“111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecuting, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

30. The prosecution’s evidence therefore placed upon the accused a statutory burden to discharge a rebuttable presumption that having been the last person with the deceased before he died, he should explain how he died. He totally failed to discharge this burden.

31. Then there is Mwendwa the other machine operator who reported to work at the same time as the accused and both reported about the missing diesel which incident the deceased was asked by their employer to investigate. Mwendwa when called by PW2 concerning the whereabouts of the deceased lied to her that the deceased had left employment. Thereafter he disappeared, switched off his phone never to be found.

32. All the analysis above leads the court to arrive at the finding that the considered circumstantial evidence separately is so strong so that when the same is all pierced together it unerringly points to no other hypothesis other than to the fact that the deceased was killed by the accused and Mwendwa, (who disappeared when things got tough) as the deceased was to investigate and report on loss of diesel from the site where the three worked. Further that the two upon killing the deceased used the excavator machine from the mining site, to dig a shallow grave where they buried his body. The deceased body was found several days after animals unearthed the same and ate several parts.

33. Based on the above the court finds the accused guilty of the offence of murder as charged and convicts him accordingly.

34. Further the court recommends to the Director of Prosecution the need to find and charge Mwendwa if still alive with a similar offence.

DATED SIGNED & DELIVERED IN GARISSA THIS 24TH DAY OF FEBRUARY, 2022

ALI-ARONI

JUDGE

In the presence of; -

Mr. Nyaga for Advocate for the Accused

Mr. Mulati for the state

Amina/Martin Court assistants