



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 7 OF 2015

REPUBLIC

VERSUS

JOHN MUREITHI MARONGE.....ACCUSED

JUDGMENT

1. The accused was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code; he was accused of having murdered Peter Muhoti Nderitu on the night 18th -19th February, 2015 at Gatugi Tea Factory in Karima Location within Nyeri County;
2. At the hearing hereof the accused was at all times represented by Learned Counsel Mr. Kiminda whereas Ms. Gicheha was the Prosecuting Counsel for the State;
3. The prosecution called a total of nine (9) witnesses to buttress its case; upon the prosecution closing its case this court found the accused had a case to answer and he was placed on his defence; his rights were explained to him and he elected to give a sworn statement of defence; hereunder is a summary of each party's case.

PROSECUTION's CASE

4. The prosecution's case was that the deceased Peter Muhoti Nderitu who was a watchman was on the night of 18th -19th February, 2015 murdered at Gatugi Coffee Factory; the evidence of the nine (9) prosecution witnesses pointed to the accused as being one of the persons who murdered the deceased;
5. **PW5** a colleague of the deceased gave a description of the attackers and stated that one of them was tall and dark and wore overalls; when arrested by AP Sgt. Ndungu (**PW9**) on the material date the accused fitted the description given and was wearing a blue overall over his clothes;
6. A soil analysis was conducted by a geologist from a soil sample obtained from the accused's shoes; and the soil composition from the shoes was found to be the same as the one from the scene of crime; the ownership of the shoes was not disputed by the accused;
7. This circumstantial evidence pointed to the accused as being one of the persons who murdered the deceased and places the accused at the scene of crime on that night; this evidence was strengthened by the accused's defence on his whereabouts that night was contradictory; his father said he sent the accused to his auntie's (**PW8**) place on the 16/02/2015 but arrived there on the 18/02/2015 for the harambee and could not account for his whereabouts on 17/02/2015; the accused evidence was not in line with that with that of **PW8** as he stated he left the venue at 8.00pm yet **PW8** stated he left at 3.00pm and his aunty could not have possibly lied; his evidence was not in line with that of **PW8** this was a pointerto his guilt;
8. As the accused's defence had not dislodged the prosecution's case counsel prayed that he be found guilty of murder.

DEFENCE CASE

9. In response, counsel for the accused relied on the written submissions dated 16/11/2020 and submitted that there was no direct evidence and no eye witnesses who identified or recognized the accused or saw him committing the offence; the prosecution witnesses at the scene were categorical that they did not identify the attackers despite there being lighting in the form of electricity at the factory;
10. The only evidence was that of the geologist (**PW4**) who only collected and analyzed soil samples taken from the Gatugi Coffee Factory

and the soil extracted from the soles of the accused's shoes; these soil samples from the accused's shoes were not presented to the court therefore raising queries as to whether any soil was tested as per the report presented by the court;

11. Counsel submitted that the accused person in his sworn statement of defence had stated that he had been in Othaya Town and was also alleged to have been in Giathenge; that both of these places were in Othaya Sub-County and are in the same geographic area; apart from the evidence on the soil sample purportedly from the accused's shoes there was nothing else to connect the accused to the commission of the offence; so as to eliminate any doubts of the soils having similar mineral contents, soil samples ought to have been collected from Othaya Town and from Chinga (the accused aunt's home) and analyzed by **PW4**; there was nothing special that was adduced on the soils at Gatugi Factory;

12. For those reasons counsel argued that the prosecution had failed to establish its case beyond reasonable doubt; that the benefit of doubt tilts in favour of the accused; Counsel urged this court to acquit the accused under the provisions of Section 306 of the Criminal Procedure Code;

ISSUES FOR DETERMINATION

13. After a full trial of the case and final submissions being made by both the prosecution and defence counsel this court has framed the following issues for determination:

(i) Fact of death of the deceased and the cause of death;

(ii) Whether the facts and evidence brought forth by the prosecution are sufficient to enable an irresistible inference of guilt to be drawn as against the accused;

ANALYSIS

14. In a charge for murder the prosecution has to prove three ingredients of the offence. It must first prove the fact of death, the cause of death and secondly that the accused caused the unlawful act or omission that caused the death; and the third leg, it must prove that the accused had the intention to cause death.

Fact of death; the death of the deceased and the cause of death;

15. On the fact and cause of death; Dr. Paul Kimathi (**PW3**) produced the Post Mortem Report ('**PExh.1**') under the provisions of Section 33 of the Evidence Act as Dr. Gichui who conducted the post mortem on the body of Peter Muhoti Nderitu (deceased) at Mukuruweini Sub-County Hospital Nyeri was unavailable and the court was satisfied that the prosecution was unable to secure his attendance without causing a delay of the hearing hereof;

16. The Post Mortem Report indicated that the deceased had a depressed left parietal fracture to the head and Dr. Gichui concluded that the cause of death was due to a severe head injury caused by an assault with a blunt object;

17. This court is satisfied that from the medical evidence of **PW3** on the cause and fact of death of the deceased and the Postmortem Report which was admitted into evidence and was marked as '**PExh.1**' the fact and cause of death was proved by expert evidence as required by Section 48 of the Evidence Act.

Whether the accused caused the death of the deceased by either an unlawful act or omission;

18. The difficulty the prosecution had was that there was no eye witness to the murder incident and therefore there was no direct evidence. The prosecution's entire evidence was based on circumstantial evidence as to what actually transpired before and up to the date of the incident.

19. Circumstantial evidence must be examined in the light of the principles set out by the Court of Appeal in **Sawe vs Republic [2003] KLR 364**. The court held as follows;

"In order to justify, on circumstantial evidence, 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. There must be other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused"

20. The prosecution's inference of the accused person's guilt is based on the following circumstances. **PW5** a colleague of the deceased gave a description of the attackers and stated that one of them was tall and dark and wore overalls; when arrested by AP Sgt. Ndungu (**PW9**) on the material date the accused fitted the physique description given by **PW5** and the accused was also wearing a blue overall and had two (2) sets of clothing underneath the overalls;

21. The only link the prosecution relies on to implicate the accused to the murder is based on the soil sample from Gatugi Coffee Factory and the soil sample from the sole of the accused's shoes; Joram Wambua Katweo (**PW4**) a chief lab technologist from the Ministry of Petroleum and Mining collected soil samples from the factory where the deceased body was found and collected another sample from the sole of the accused's shoes; his evidence was that the sample from the accused shoes had a small trace of manganese (0.1%) whereas the soil sample

from the factory where the body was found had no traces of manganese;

22. The evidence as presented by **PW4** on the mineral composition of the two samples is found to raise doubts that weaken the chain of the circumstantial evidence relied on by the prosecution that places the accused at the scene of crime;

23. The accused is said to have visited Chinga (**PW8**'s home), he had also been drinking in Othaya Town and was also alleged to have been at Gatugi Coffee Factory; this court has judicial notice that these places are located within the same geographic area and the soil samples ought to have been collected from all places visited by the accused so as to eliminate any doubts as to his presence at the scene of crime;

24. It is this court's considered view that the prosecution evidence on the soil samples are not similar in mineral composition and behaviour and are not from the same vicinity and do not link or place the accused at the crime scene;

25. In the circumstances of the case, apart from the evidence on the soil sample purportedly from the accused's shoes there was nothing else to connect the accused to the commission of the offence; what is obvious is that the accused was arrested on suspicion and it is possible that he may have lost his way due to his drunken stupor and may have been in the wrong place at the wrong time; otherwise the facts and evidence brought forth by the prosecution are found to be insufficient to enable this court to draw any irresistible inference to the exclusion of any other reasonable hypothesis of innocence;

26. This court is satisfied that the circumstantial evidence is inconclusive and that it fails to meet the threshold that the unlawful act that led to the death of the deceased was committed by the accused, so as to justify a conviction

FINDINGS AND DETERMINATION

27. For the foregoing reasons this court makes the following findings and determination:

(i) This court finds that the fact and cause of death was proved by expert evidence.

(ii) This court finds that the circumstantial evidence brought forth by the prosecution was insufficient to enable an irresistible inference of guilt to be drawn as against the accused as it does not meet the threshold to justify a conviction.

(iii) The accused **JOHN MUREITHI MARONGE** is hereby found **NOT GUILTY** of the offence of murder and is hereby acquitted under the provisions of Section 306 of the Criminal Procedure Code.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 22nd day of April, 2021.

HON. LADY JUSTICE A.MSHILA

JUDGE