



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 3 OF 2010

REPUBLIC

-VERSUS-

HERMAN MUNENE GITHUA

JUDGMENT

On 16 December 2009 the lifeless body of John Nderitu Githua was found lying on his settee in his house. A few weeks before his death, the deceased had pulled down a fence erected on his farm by the accused; The latter was his nephew and both lived either in the same house or in separate houses but in the same compound. The accused was suspected to have been behind his uncle's murder because of the differences that may have arisen between them as a result of the fence incident.

Accordingly, the accused 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. It was stated in the information that on the 5th day of December 2009 at Gathugu Farm in Nyeri District within Central Province, he murdered John Nderitu Githua.

Before taking plea, Dr. Samuel Owino Oganga (PW1) subjected the accused to a mental assessment and established that he was fit to plead and stand trial. He eventually pleaded not guilty to the charge thereby setting the stage for the prosecution to marshal as many as 21 witnesses in prosecution of its case against him.

Nancy Nderitu (PW2) testified that the deceased and her husband were cousins and that their residences were not far apart. As a matter of fact, the deceased used to take meals from her house. She also knew the accused as much as she knew the deceased; it was her evidence that he was also related to her husband in the sense that he was a son to her husband's cousin. He initially lived with the deceased. Three weeks before the deceased's death the accused and the deceased had quarrelled over a fence; the deceased had pulled down a fence which had been erected by the accused.

On 5 December 2009, the deceased had come to her house for breakfast as usual. He also asked for his cheque book from which he removed a cheque leaf for withdrawal of a sum of Kshs. 10,000/=. Apart from the cheque book, Nancy was also in custody of the deceased's title documents for his land in Subukia. It was her evidence that the deceased was close to her.

She got to learn of the deceased's death on 6 December 2009 when her husband(PW4) informed her that the deceased had been found dead in his house. On cross examination, she testified that the deceased did not come for dinner on 5 of December 2009 and she couldn't tell the time he arrived at home.

The person who first saw the deceased's lifeless body in his house was James Nderitu Murefu (PW3). It was his evidence that the deceased was his cousin and that on 6 December 2009 he was herding his goats when they strayed to the deceased's farm or compound. As he drove them out, he peed through the window to the deceased's house and noticed a blanket on a settee. On his way from the deceased's home, he met John Nderitu (PW4) whom he told what he had seen. Together they went back to the deceased's house where they entered through the backdoor because the front door was locked. The back door was not locked so they simply pushed it open. They uncovered the blanket on the seat, only to find the deceased's body. Apart from the body, they also noticed a bottle of alcohol and a cup in the house. There was also one shoe near the back door and the other shoe in the sitting room.

John Nderitu (PW4) testified that he too was related to the deceased; he was either his cousin or a distant nephew. Like his wife (PW2), he testified that the deceased had been to their home on the morning of 5 December 2009. He was not seen again on that day and so he proceeded to his home on the following day, apparently, to check on him.

He met James (PW3) on his way; he was grazing his goats near the deceased's house. When he enquired from him whether he had seen the deceased, James told him that the deceased had left with two other people whom he identified as Kibe and Maina. He therefore went back to his home. However, after about two hours, James called him and told him that he had peeped through the deceased's window and noticed something suspicious on the seat. It is then that he rushed back and found the deceased's body on the seat covered with a blanket.

He reported the matter to the police but it was his evidence that the police were aware of the incident before he reported it.

It was his evidence that the deceased had his clothes on; a retired police officer whom he identified as Philip Mwangi (PW11) searched the deceased's pockets but nothing was recovered. Later in his testimony, the witness said that the deceased's identification card and keys were recovered from his pockets.

The witness testified further that the deceased was a heavy drinker and at times he could miss meals. It was also his evidence that it was James (PW3) who suggested that they enter the house through the back door because it was open.

The accused, according to his testimony, used to live with the deceased before he left to stay with his aunt. No police officers visited the scene and it is members of the public who organised for the body to be taken to the mortuary. Apparently, the accused was among the people who accompanied the body to the mortuary; as a matter of fact, he is the one who returned the deceased's clothes home.

Joseph Wanjohi Kabukuru (PW5) testified that on the 5th day of December 2009, he saw the deceased together with several other people at Paradise club at Giakanja. He named these people as Mbai, Wanjohi, Mbogo, Muhia and Mwangi. Of these people, the deceased was quarrelling with Mbai. He even hit Mbai with a bottle but Mbai did not retaliate. On the following day he was tasked by one Ngugi to look for the accused and inform him that his father had passed away. He managed to trace him at a club at Giakanja where he was drinking. The accused threatened to take his own life; he also informed him that that he had the deceased's phone which the deceased had allegedly given him the previous night. However, he did not have the phone as it was in his house.

Ayub Ndegwa Karuga (PW6) testified that on 5 December 2009, at about 8.00 P.M., he travelled in the same taxi as the deceased on his way home. Apart from the deceased, there were two other people who were with the deceased. The deceased alighted at his gate. According to this witness, he appeared drunk.

The taxi driver himself was Lawrence Mataru Wambugu (PW7) whose evidence was that on the material date, he was with one Ayub when one Mzee Mbogo asked him to drive them home. The deceased and his friend also entered the taxi. According to him the deceased was very drunk. He dropped him outside his compound. He couldn't however tell whether any of the other occupants of his taxi went to the deceased's home after they alighted.

James Mbogo Nderitu (PW8) testified that both the deceased and the accused were persons well known to him; both were his relatives. On 5 December 2009 he saw the deceased in Paradise bar taking alcohol; he also saw him hit Mbai who responded by just walking away. The deceased then asked him to look for a taxi to take him home. Together they boarded a taxi. The deceased alighted at his gate with a friend. He proceeded to his home which was about 100 metres away.

The deceased, according to his testimony, lived alone in his house while his sister lived in another house with the accused but in the same compound.

Although he would come for breakfast at the witnesses' house, the deceased never turned up on 6 December 2009. As far as he was aware, the deceased had cordial relationship with the accused but they differed when the accused started paddocking the deceased's land while the deceased was away in Subukia. When the deceased returned, he instructed the witness together with Lawrence to pull down the fence. The deceased died two weeks after that.

Lawrence Maina 's (PW9's) evidence was to the effect that he was drinking with the deceased on 5 December 2009. He confirmed that indeed the deceased threw a bottle at Mbai while at the bar. He left in a taxi together with the deceased and Mbogo and that the deceased was dropped at his gate.

The witness testified that he was one of the people who were asked to look for the accused whom they found at a club drinking alcohol. The accused is alleged to have told them that the deceased had summoned him the previous night and given him his phone. It was his evidence that the accused and the deceased were not in good terms and this was all because of the fence that he, the witness, had pulled down together with Nderitu (PW8) after they had been instructed to do so by the deceased.

Joseph Mbai Mbidha (PW10) testified that he was the man who was hit by the deceased in Paradise bar. However, he had no grudge against him. He knew both the accused and the deceased and he was aware that the two related well.

Philip Mwangi Ireri (PW11) testified that he frisked the deceased's pockets while his body was still lying in his house. He recovered a match box and a bank slip. He is one of the people who took the deceased's body to the mortuary.

James Maina's (PW12's) testimony was to the effect that he had seen the deceased give his brother Wahome, his key. It was also his evidence that when they reported the death of the deceased to the police, the officers there declined to come to the scene. They instead gave them a letter apparently authorising them to take the deceased to the mortuary. It is then that they hired a vehicle and took the body to the morgue. Maina testified further that he is the one who gave the accused the deceased's clothes at the mortuary. The witness testified that the accused was charged because he was the one who lived with the deceased although he admitted that there was somebody else who shared the same compound with them.

On her part, Grace Wangare Njihia (PW13) the owner of the bar in which the deceased had been drinking before he left for his home, confirmed that indeed the deceased was at her bar and that he even bought beer for other people on the evening of 5 December 2009.

Moses Wambugu Waruthia (PW 14) testified that he lived in the same neighbourhood as the accused and the deceased. However, it was his evidence that only the accused and the deceased shared the same compound; that apart from the two, there was nobody else living in that

compound.

Joseph Wanjohi (PW14) testified that he went looking for the deceased at Paradise pub on 5 December 2009 at about 8.00 P.M. but that he did not find him. It is only on the following day that he learnt of the deceased's death. It was his evidence that the accused lived alone; similarly, the deceased also lived alone. A sister to the accused's mother lived in the same compound where the accused and the deceased lived.

Titus Ngugi (PW 16) testified that he is the one who spotted the deceased's phone in his house. This was on 9 December 2009. He also testified that he knew the accused and he related well with the deceased.

The deceased's daughter, Elizabeth Wanjiru (PW 17) testified that she together with her siblings got news of their father's death while in Nairobi where they were working on 6 December 2009. They travelled to Nyeri the same day and found members of the public at their home; the accused was among them. On 15 December 2009, they proceeded to outspan mortuary to identify the body for the post-mortem exercise. She testified that the accused not only lived in the same compound with her father but also that he was born there. It was her evidence that they lived in the same house. She also testified that her aunt Wamuyu lived in the same compound. Her house was about two meters from her father's house.

The deceased's wife Margaret Wanjiku Githua (PW 18) testified that like her daughters she only learnt of the deceased's death when she was in Nairobi. She also went to the morgue to identify the body. It was her evidence that the deceased lived with the accused in the same house. It was a three-roomed house.

Chief Inspector Kadei (PW19) testified that on 8 December 2009, Elizabeth Gathua (PW 19) came to his office to report that a mobile handset had been found at the deceased's house. He proceeded to the scene and recovered the phone. He handed over the phone to sergeant Wanjiru who investigated the case.

The pathologist who conducted the post-mortem on the deceased's body was Dr. Dindi Kithi (PW 20); her testimony was that the body was that of an African male. It had a bruises on the right cheek and the chest was deformed; there was a fracture of the ribs on the right side and bruises on the right shoulder. There was also massive haemothorax on his right side. She opined that the cause of death was severe chest injury secondary to trauma.

The last prosecution witness was Margaret Wambui Mukori (PW21) testified that on 8 December 2009, she located the deceased's phone at his house near the door. She was with her cousin Wairimu, the deceased's daughter Ciru and other relatives. She also testified that the accused lived separate from the deceased but in the same compound.

In his defence the accused opted to give sworn testimony. He confirmed that the deceased was his uncle. He only learnt of his death from John Nderitu (PW4) while he was working not far from where they lived. He went back home and indeed confirmed that the deceased had died. He accompanied those who took the body to the mortuary. It was his evidence that he lived in the same compound as the deceased but in separate houses. The deceased lived alone. He denied murdering the deceased.

As far as the allegations about the fence are concerned, it was his evidence that it was the deceased who had given instructions that the wall be constructed; however, he instructed the same people whom he told to construct the wall to destroy it when he returned from Subukia. He denied ever running away after the deceased's death. It was his evidence that he had lived with the deceased for 30 years.

Section 203 of the Penal Code under which the accused was charged reads as follows:

203. Murder

Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

Section 204 which is to be read alongside section 203 is no longer of any consequence since it has been declared to be inconsistent with the Constitution to the extent that it prescribes death as a mandatory sentence (See **Supreme Court Petition No. 15 of 2015 Francis Karioko Muruatetu & Another versus Republic (2017) eKLR**).

As for section 203, it is necessary that in order to establish an offence of murder, the prosecution must prove several things which, by and large, constitute the material elements for this offence. It must prove, first, death of a person; second, that the death was as a result of an act or omission of another person; third, that the act or omission was unlawful; and, finally, that the person who did the unlawful act or omitted to act had malice aforethought.

The evidence that John Nderitu Munene died on or around 5 December 2009 is not in doubt; he was certified to have died by the pathologist, Dr. Dindi Kithi (PW20) after his body had been positively identified by his close relatives who included his daughter, Elizabeth Wanjiru Githua (PW17). The nature of the injuries and the cause of his death were also ascertained by the same pathologist. Both these aspects of her evidence point to the irresistible conclusion that the death was caused by another person and that the act which resulted in the death was unlawful.

The only question that remains to be resolved is whether the accused was the perpetrator of the crime and if so whether he had the necessary malice aforethought.

It is apparent from the prosecution witnesses that none of them saw the accused murder the deceased and so the prosecution case was solely based on indirect or circumstantial evidence. And, as far as I understand this case, the only circumstantial evidence presented was that the

accused lived with the deceased and that a few days before the deceased's death, they had differed over a fence that that the accused had erected on the deceased's farm.

It is trite that an accused can be convicted on circumstantial evidence only; as a matter of fact, this sort of evidence has been hailed as the best evidence. It was so held in **Tumuheire versus Uganda (1967) E.A at pages 328 and 331** that:

“It should be observed that there is nothing derogatory in referring to evidence against an accused as circumstantial. Indeed, circumstantial evidence in a criminal case is often the best evidence in establishing the commission of a crime by a person as in the present case.”

But being indirect evidence, it must be narrowly examined. In **Teper versus Republic (1952) A.C. at page 489**, it was explained that circumstantial evidence carries with it the danger of fabrication of evidence in order to cast suspicion on another; the court has, therefore, to be cautious that there are no other co-existing circumstances which would weaken or destroy the inference of guilt on the part of an accused person.

So, to justify an inference of guilt, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Secondly, the circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be closely connected with the fact sought to be inferred. In summary:

- (a) The circumstances from which the conclusion is drawn should be fully established;
- (b) All the facts should be consistent with the hypothesis;
- (c) The circumstances should be of a conclusive nature and tendency;
- (d) The circumstances should exclude every hypothesis but one proposed to be proved.

While evidence was presented to the effect that the deceased lived with the accused and that the two of them had differed a few days before the deceased's death, that in itself could not be consistent with the hypothesis that the accused must have murdered the deceased. And in any event, those circumstances upon which this hypothesis of murder was based cannot be said to be either either of a conclusive nature or that they tend towards the accused's murder of the deceased.

To begin with, the evidence that the accused was the only person who lived with the deceased was neither consistent nor conclusive. According to John (PW4) the deceased and the accused lived together at some point in time but that at the time of the deceased's death, the accused had left and was living with his aunt. Mbogo's (PW 8's), Wambugu's (PW14's) and Wanjohi's (PW15's) evidence was that the accused lived alone. According to Waruthia (PW14) only the deceased and the accused shared the same compound; he was categorical that nobody else lived in that compound. The deceased's daughter Wanjiru (PW17) and his wife Margaret Wanjiku (PW18), on the other hand, knew that the accused lived with the deceased in the same house.

These inconsistencies raised a reasonable doubt as to whether the deceased shared the same house with the deceased and whether, for that very reason, he would be presumed to have murdered him.

Irrespective of whether the deceased lived with the accused or not, there was evidence that the deceased's sister lived in the same compound as the deceased. Her house, according to the evidence of the deceased's daughter, was only two metres away from that of the deceased. For some reason, she was not one of the witnesses that the state called; while her testimony may have shed some light on what may have transpired on the fateful night, the primary point is that, besides the accused, there was somebody else who shared the same compound with the deceased. For this reason, the accused could not be tied to the deceased's murder only because he lived in the same compound with the deceased.

Again, the evidence that there could be differences that may have motivated the accused to murder his uncle does no appeal to me to be proof beyond doubt that the accused was the murderer. It must be remembered that hours before the deceased's death, the deceased had himself confronted Mbai (PW10) at Paradise pub hours before his demise. As a matter of fact, Mbai himself testified that the deceased had struck him with a beer bottle. So if differences, by themselves could be deemed to be the motivating factor, the deceased's differences with Mbai could not be taken out of the equation.

There is a possibility that the deceased may have been accompanied with strangers to his home or house.

Karuga (PW6) testified that when he entered a taxi in which he travelled home, he found the deceased with two other people. The driver of the taxi (PW7) confirmed that indeed the deceased was with two people whom he regarded as the deceased's friends. He also testified he left Muhia and Mbogo (PW8) together with the deceased at the deceased's gate and that he could not tell whether they entered the deceased's compound or house.

But Mbogo himself testified that only the deceased and his friend were dropped at the deceased's gate but could not tell whether his other two passengers followed the deceased. It was also his evidence that there was nothing to suggest that the accused was behind the deceased's murder. So it is possible that any of these people could have murdered the deceased.

Finally, it is apparent that the murder was never investigated. According to Maina (PW12), when the report of the murder was made to the

police, they declined to come to the scene and instead authorised those who made the report to take the body to the mortuary. Chief Inspector Daniel Kadei (PW19) suggested in his testimony that one sergeant Wanjiru investigated that case but no such officer ever testified and neither was it ever suggested by the prosecution that she would testify in that capacity.

In the ultimate, the circumstantial evidence presented by the prosecution is replete with co-existing circumstances which, in my humble view, have weakened or altogether destroyed the inference of guilt on the accused's part. What has been presented as the inculpatory facts cannot be said to be incompatible with the innocence of the accused, or incapable of explanation upon any other reasonable hypothesis than that of his guilt.

It would be unsafe to convict the accused on such evidence. Accordingly, I hold that that prosecution has not proved its case beyond reasonable doubt. The accused is acquitted of the charge of murder. He is accordingly set at liberty unless he is lawfully held.

Dated, signed and delivered this 26 June 2020

Ngaah Jairus

JUDGE