



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL CASE NO 54 OF 2017**

**REPUBLIC.....DPP**

**VERSUS**

**GABRIEL MARI GAKUL.....ACCUSED**

**JUDGMENT**

1. **Gabriel Mari Gakui**, the Accused herein is charged with Murder contrary to Section 203 as read with section 204 of the Penal Code. In that on 25<sup>th</sup> November 2017 at Gaithece Village, Ituro Location Gatundu South Sub-County of Kiambu County, he murdered **Anthony Njoroge Gitau**. The Accused denied the charge and was represented by Ms Sebastian.

2. Through ten witnesses, the prosecution presented the following case. The Accused and the deceased were cousins as their fathers were siblings. The former is the son of **John Gakui Mari (PW 4)** and brother to **Joseph Mukura Gakui (PW5)**, while the deceased is the son of **Virginia Wanjiku Gitau (PW3)**. The families are settled and reside close together in Gaithece village of Ituro Location Gatundu South Subcounty.

3. On the 25.11.17 the deceased and Accused were engaged in a disagreement over some money which the latter owed the former. The disagreement escalated to a fight which **PW5** came upon on his way home at about 7 p.m. and intervened. The witness then went home. However, the matter was far from over, as a few minutes later, **Margaret Wanjiru Mutogoni (PW6)** heard the two men run into her compound and engage in a fight. She summoned her husband **Robert Kihara Njenga (PW1)** also a member of the combatants' extended family. **PW1** intervened and dispersed the two men who left the compound.

4. Believing the matter was over, **PW1** and **Pw6** returned to their house. At about 8.00 p.m. of the same night, a local, one **Patrick Muchuku Kiarie (PW2)** was walking to his home at Gaithece from Gatundu town. He noticed a human form lying on the ground on the road, and flashing his torch, recognized the form to be the that of the deceased. He noted that he was bleeding and apparently dead. He ran to **PW3's** house and reported to her. **PW3** raised an alarm, heard by several villagers including **PW1, PW6** who flocked to the scene. A report was made to police and **PC Cornelius Wamalwa (PW9)** was dispatched to the scene. After documenting the scene, **PW9** arranged for the removal of the body to the mortuary. Early on the next morning, the Accused appeared at the Juja home of his sister **Anne Wairimu Maina (PW8)** who, having become aware that the Accused was being sought over the death of their cousin, immediately called Juja police. Police arrested the Accused.

5. On 1<sup>st</sup> December 2017 **Dr. Muturi** conducted the postmortem examination on the deceased's body, identified by **PW4** and one **Boniface Kinungu Kinuthia (PW7)**. The cause of death was a penetrating stab wound on the chest, that perforated the aorta and right lung, which then collapsed. The Accused was subsequently charge.

6. In his defence, the Accused elected to make a sworn statement. To the effect that the deceased was his cousin; that he (Accused) lived and worked at Juja; that he travelled to Gatundu on 25/11/2017 to visit his mother and arriving at Gatundu town at 3.30 p.m, he went to Mesco Club where he met the deceased and his friends drinking alcohol. He joined and when he eventually decided to leave, the deceased joined him and together they boarded a *boda boda* motorcycle to Gaithece village.

7. On reaching the village, the Accused did not have loose change to pay his KShs.50/= and the deceased paid both his and the Accused's fare. But as the duo walked homeward, the deceased demanded instant refund of KShs.50/=. Soon a fight broke out between them. And which **PW5** stopped by separating the men. That having parted with the deceased, the Accused went home and shortly later decided to visit his uncle (**PW1**), only for the deceased to follow him there and attack him. That the uncle intervened and both men left **PW1's** homestead, the deceased joining his two companions who were at **PW1's** gate. The Accused later travelled to Juja only to learn from **PW8** on the next day, that the deceased had passed away. He was eventually arrested at Juja by police.

8. There is no dispute that the Accused and the deceased are cousins. Both hail from Gaithece village, Ituro Location of Gatundu South sub-County. There is no dispute that on the evening of 25<sup>th</sup> November 2017, the deceased and Accused were caught up in a disagreement over some KSh.50/= owed by the latter to the former, which escalated to a physical fight, witnessed initially by **PW5** near **PW5's** homestead, and

later by **PW1** and **PW6** at the home of **PW1** where the combatants had extended their fight. That within the hour of the departure of the deceased and the Accused from **PW1's** compound, the former was found lying dead within shouting distance of **PW1's** home. He bore a stab wound to the chest and was bleeding.

9. The court must determine whether, of malice aforethought the Accused caused the injuries leading to the death of the deceased. The deceased, according to **PW1, PW2, PW3 and PW5** was found lying on the ground, apparently by a footpath while oozing blood. It transpired, upon being turned over by police who visited the scene, that the deceased bore a stab wound to the chest. That wound, according to the postmortem report produced with the consent of the defence by the investigating officer **PC Kainga (PW 10)** as **exhibit 1**, was the cause of the death. The report indicates that the stab wound perforated the aorta, the upper right lung lobe and caused bleeding and the collapse of the lung. There is little dispute as to the cause of this death, therefore.

10. Further, even though nobody witnessed the actual stabbing of the deceased, there is undisputed evidence through **PW1, PW5 and PW6** that the deceased and Accused had earlier scuffled over an extended period, eventually landing in the home of **PW1** and **PW6**. The circumstances in which the Accused and deceased arrived at the said home were described by **PW6** in her evidence as follows:

**“On 25.11.17 at 700pm I was cooking. I heard two people chasing each other and in a fight. I recognized the two as Accused and Njoroge (deceased). I called my husband Kihara (PW1) who removed them from our compound. Then we went inside our own house .... The security lights were on so I saw the combatants clearly....”**

11. Under cross-examination **PW6**, admitted that she did not know why the men were fighting but confirmed they were only exchanging blows, not using weapons. At no time did the Accused suggest to **PW6** or her husband that he had come visiting and was in the kitchen of **PW6** when the deceased came in to attack him. Similarly, despite **PW1** and **PW6** asserting that after the former had separated the fight the men left and the couple returned to their house, the Accused never put it to them, and especially **PW1** that two men had been waiting for the deceased at **PW1's** gate and that **PW1** questioned these men who left in the company of the deceased. Be that as it may, **PW1** and **PW6** told the court that a little while later, they heard screams and rushed out to the road. This was 8.30 p.m, and the alarm was raised by **PW3** who was screaming after **PW2** who had seen the deceased's body at 8.00 p.m. had notified her. According to **PW6**, the scene where the deceased's body lay was by the road some 5 minutes' walk from her house.

12. According to **PW5**, the body lay some 10 metres away from the scene he first saw the men fighting and about five minutes from his home. **PW5** during cross-examination said his home was 5 metres away from scene of initial fight he witnessed, but he denied the possibility that thugs had attacked the deceased. As to the duration of time that elapsed before he learned of the stabbing of the deceased, he stated in his evidence -in -chief that about 20 minutes after separating the initial fight and parting with the Accused and the deceased, his mother summoned him to go inquire into reports that had reached her to the effect that the deceased had been stabbed.

13. All these witnesses save for **PW2** were related to the deceased and the accused. None had an axe to grind with the Accused. What one gathers from their individual and collective accounts is that the transaction involving the fight between the two men was more or less continuous, save for the brief interval when **PW5** separated the combatants. Thus, from the initial spot where **PW5** found them, separated them, to the subsequent chase into the compound of **PW1** and **PW6** the fighting continued, as the deceased demanded some money from the deceased. Eventually, upon being thrown out the two men left about the same time, and inside of one hour, **PW2** was to discover the body of the deceased lying within minutes of the home of **PW1** and **PW6** as well as the initial spot of the combat.

14. This was an uninterrupted transaction and the Accused having been the last person seen in the company of the deceased while alive ought to give a plausible account of what happened after the duo left **PW1's** compound. See Section 111 of the Evidence Act. The Accused's claim that the deceased was received at **PW1's** gate by two companions were only raised at the defence, and not canvassed with **PW1** and **PW6** or indeed any other witness and appear an afterthought. The Accused could not have overlooked such an important matter.

15. Similarly, the Accused's alleged decision to travel to Juja on the material night appears strange given the events of the preceding hours. By his testimony, the Accused lived at Juja and had travelled to Gatundu to visit his mother. However, by his own account, he had on arrival in Gatundu town visited a club where he remained until early evening/night and thereafter engaged in scuffles with the deceased, going home and then deciding to visit his uncle **PW1** and finally to travel back to Juja at night. On all accounts, particularly by **PW3** the Accused lived at Ituro and not Juja. None of the witnesses including the Accused's father (**PW4**) and sister (**PW8**) indicated surprise that on the material night the Accused was at Ituro village rather than Juja and indeed the Accused did not canvass his alleged residence at Juja with any of them.

16. In the circumstances of the case, the Accused's admitted disappearance from Ituro on the material night had everything to do with what had happened to the deceased rather than a last-minute decision to go to Juja. If the Accused had a home at Juja his sister who resided there would have known and possibly promptly informed the police as she did on the next day. She testified that she had been informed by the night of 27<sup>th</sup> November 2017 that the Accused was being sought, and when the Accused appeared at her home early that morning, she called the police.

17. **PW8** said the Accused was reluctant to say why he was being sought, and on his own admission reluctant to surrender to police. That the Accused person left Gaithece village apparently late on the material night arriving at **PW8's** house early the next day suggests guilty knowledge. And although the Accused denied in cross-examination that he had stabbed the deceased before fleeing to Juja, when all the circumstances are taken together, that appears to be what actually happened. On material before the court it appears more plausible that the Accused lived not at Juja as he claimed, had not travelled to Ituro to see his mother as he claimed but was a resident of Ituro.

18. From the evidence adduced by **PW1, 2, 3, 4, 5 and 6**, the Accused engaged in an extended fight with the deceased on the material night. **PW5** who appeared a truthful witness said he had noted that the deceased had a knife. None of the witnesses **PW1** and **PW6** attest to seeing such knife in the brief incursion made into their home by the combatants. The Accused may have disarmed the deceased or the deceased may have lost the knife. Whatever the case, only a few minutes after **PW1, PW5 and PW6** separately saw off the two men, the deceased lay dead within the scene of the night's transactions. He had been stabbed. The Accused escaped to Juja ending up at **PW8's** doorstep early the

next day.

19. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] e KLR**, the Court of Appeal had this to say on this point:

**“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.”**

See also **Musili Tulo v Republic Cr. App. No. 30 of 2013**.

20. The Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court supports a conviction. The court stated: -

**“Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions 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.**

(see also **Sawe v Republic (2003) e KLR and GMI v R Cr. App. No. 38 of 2011**).

21. In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt.

(see **Teper v R [1952] ALLER 480 and Musoke V R [1958] E.A 715**). In **Dhalay Singh v Republic, Cr. App. No. 10 of 1997**, this court reiterated this principle as follows:

**“For our part, we think that if there be other co-existing circumstances which would weaken or destroy the inference of guilt, then the case has not been proved beyond any reasonable doubt and an Accused is entitled to an acquittal.”**

22. In **Neema Mwandoro Nduzuya v R [2008] e KLR** the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

**“It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R v Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.**

23. In its earlier decision in **Mwangi and Another v Republic (2004) 2 KLR 32**, the Court of Appeal exhorted 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”**

See also **Regina v Exall and Others (1866) 176 ER 850** emphasizing the view that all pieces of circumstantial evidence ought to be viewed as individual strands of a cord which when combined, constitute a rope.

24. Reviewing all the evidence before it, the court rejects the denials contained in the defence which in the court’s considered view have been effectively displaced by the prosecution evidence. Considering the timing and sequence of events on the material night, the Court is convinced that soon after the Accused and the deceased left **PW1**’s home , the Accused inflicted the fatal injury on the deceased and then fled Gaithece village. The nature of injury and the location thereof are such that in all likelihood there was an intention to cause grievous harm or death. Section 206 of the Penal Code provides as follows:

**“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances**

—  
**(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;**

**(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;**

**(c) an intent to commit a felony;**

**(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”**

25. The Accused person has claimed that he and the deceased had had some drinks at the club before departing for home. There is no evidence or claim by him or by any other witness that the Accused and deceased appeared or acted drunk. Moreover, the Accused, after the stabbing had the presence of mind to hatch a plan to escape from Gaithece village to his sister's home at Juja. In the circumstances described by prosecution witnesses and the Accused himself, there is nothing to negate malice aforethought on the part of the Accused; he was well capable of forming the necessary *mens rea* in terms of Section 206 of the Penal Code. In the result, this court finds that the prosecution has proved its case against the Accused beyond any reasonable doubt. The Accused is hereby convicted as charged.

**DELIVERED AND SIGNED VIRTUALLY ON THIS 26<sup>TH</sup> DAY OF OCTOBER 2020.**

**C. MEOLI**

**JUDGE**

**In the presence of:**

**For the DPP Mr. Kasyoka .**

**For the Accused Ms. Sebastian**

**Accused present**

**C/A : Nancy**