



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 35 OF 2011

REPUBLICPROSECUTOR

VERSUS

JOSHUA NDIRANGU NDERITU.....1ST ACCUSED

PETER KARIUKI NDERITU.....2ND ACCUSED

RULING

On 7th of November 2011, the body of Julius Mathenge was found by **Virginia Wanjiru Muchemi** PW3 in their shamba. It was lying among the arrow root plants at the place where the river flowed into the shamba. He was lying on his stomach, dressed in a shirt, trouser and gumboots. Upon seeing the body she raised the alarm. And a crowd formed across the ridge from where people were watching. She called her husband, PW1 **Moses Muchembo Gachai** and other the members of the family.

Moses informed his sisters, and then travelled to the scene. The assistant chief arrived with security personnel among the PW 5 **NO. 219204 Chief Inspector Jackson Kiema**. Upon arrival he noted that where the body lay there was also a packet of furandine. The body had no visible injuries and had begun to decompose. It was removed to Mukurweini hospital mortuary. He confirmed that the deceased had last been seen alive on 5th November at club Vineyard Bar at Kagonye market according to the evidence of PW 8 **Peter Gichuki Gachara** his brother and PW 11 **Joseph Ndirangu Kariuki** the bar tender.

PW 11 told the court that the deceased went into the bar at about 6 PM and ordered 3 marks of keg beer. He was in the company of others, his brother PW8, Kariuki and Joshua. They took the drinks peacefully and his brother left at about 9:30 PM. PW 8 testified that he lived briefly 9:30 PM only came back he found that is brother and his 2 friends had already left. He too went home.

The following day he met Joshua at Kagonye shopping Centre, who told him that they heard some noise within the compound and in the morning. His mother had found a cap and a jacket outside which she wanted to take to the chief. When I check them he recognized them as belonging to the deceased. PW 8, said he did not see his brother that day and in the following day, when he met the village elder who told him about the discovery of his brother's body. He identified the accused persons, as well as persons he had seen with his brother. He identified jacket and a black cap in court. He confirmed that the jacket was his brother's, but the cap was not. PW 7 **Mary Wamuyu** the mother to the deceased confirmed Joshua went to her house on 6th November at about 11 AM, looking for the deceased. Joshua told her that he had the deceased's report.

She said that she last seen the deceased on 5th November in the evening when he had brought fodder for the cattle, but he never came back to milk them. And 6th in the morning, she noted that his room was still locked and he had not woken up to milk the cows. So when Joshua came looking for him, she told them she had not seen him. By the following day, he had still not shown up yet and the tea needed to be picked. That is the day the body was found in the arrow roots shamba.

On 9th November, a post-mortem was conducted on the body of the deceased by Dr. Njuki. The report was produced by **Dr. Kimathi Paul** PW15.

The findings were that externally the body had blood oozing from the mouth and nose, swelling on the left maxillary area, ligature marks, hematoma over the lateral aspect of the left hemi thorax, bruises on the left shoulder and the left hypogastric region.

Internally the left lung was collapsed, with massive hemathorax, hematoma on the left cheek area, hematoma between the skin, scalp and the skull on the left temporal area and there was evidence of epidural hemorrhage. He concluded that cause of death was asphyxiation secondary to strangulation, severe chest and head injury.

It appeared as if he queried the possibility of poisoning by the writing in the report "Poison?" He noted in the report indicated that some specimens had been taken from the body for further examination: the left lobe of the liver, stomach and contents, blood and urine.

On cross examination he testified that each of the indicated causes of death asphyxia, severe chest injuries and poison could cause death on its own. That the specimens were taken for purposes of toxicology. He said the postmortem report would be conclusive if the toxicology report was available. There was no evidence on the PM as to the probable type of weapon used to cause injuries on the deceased, neither was there anything to indicate that the deceased had been forced to take poison. That the report was not conclusive whether poisoning was the cause of death.

This postmortem examination was attended by PW2 a sister to the deceased **Charity Muthoni Karanja**. She noticed the bruises on the deceased body. She told the court that the doctor who conducted the postmortem told them that the deceased was kicked. On cross examination she confirmed that she had not mentioned the alleged injuries in her statement to the police though she had recorded it the same day. She stated that she observed blunt injuries on the ribs and bruises on the hands but no blood, saying that his face appeared to have a blunt injury on the left side. That she had also learnt that about the poison found next to her brother's body from PW1.

The deceased's sister **Zipporah Wanjiru Karimi** PW9 testified she viewed the body at the mortuary and observed the injuries on 8th, a day before the Post mortem. She testified that the mortuary attendant confronted her and members of her family, to quote her words "**asking why we had taken to him a murdered person while we claimed it was suicide**". She said it was then that they decided to go to the OCS Othaya and demand a postmortem, which she attended on the 9th. She testified that "**the man had been hit on the ribs with something sharp, and the neck was not holding**". She recalled events that had happened prior to the deceased's demise. That on the 28th October the deceased had taken his mobile phone to her shop for charging. She said that a person who was saved as Joshua called severally asking for the deceased. He was informed that the phone was charging but still called to send what sounded as a warning. She called the number and told the Joshua at the other end that the owner of the line would call him. She identified a number 0717***** as Joshua's number. On cross examination she said she had also given the deceased's number to the police but it was not in her statement. She went on to describe the injuries she had observed on her brother's body but when her statement was put to her she had not mentioned those. She also said the police mentioned the poison found next her brother's body but they did not show her the same. She said she did not recall the name of the mortuary attendant who told them their brother was murdered, neither did she know the people who killed her brother.

PW12 **Simon Gichohi Mwangi** Assistant chief Rukira sub-location. He confirmed that when he and the police arrived at the scene besides the body there was a packet of furandan pesticide. On cross examination he said that he had not been shown the pesticide in court.

PW14 No. 88260 **PC Philip Lodupayi** was among the officers who accompanied the OCS to the scene where the body was found together with PW12. He confirmed that besides the body was bag containing 'furandan anti- pesticide'. He attended the postmortem and requested blood, urine, liver and stomach samples for examination.

He later learnt Joshua was in possession of a jacket and cap of the deceased. He and PW13 **No. 239342 APC Richard Apaka** went to the house of Joshua on 10th and they found one striped green jacket and a black cap, which he recovered together with Joshua's phone. They made an inventory.

According to APC Apaka on 15th they were sent by the OCS to the office of PW12 to pick Peter Kariuki Nderitu. They were presented before PW16 **Dr. Angela Wekesa** at Thika Level 5 hospital for mental assessment examination on 22nd November 2011. She produced their reports of the same date as evidence at the same time admitting that she was not a specialist in psychiatry. A perusal of the file revealed another set of Psychiatry examination reports headed 'mental status assessment' dated 9th January 2012 by Dr. Thuo J.N Consultant Psychiatrist Embu PGH. On 6th October 2015 Ngaah J noted that the 2nd accused appeared to be mentally unstable and was referred for mental checkup at Nyeri PGH. The medical notes on the referral notes indicate that he was normal save for alleged diabetes.

PC Mpakani then prepared a charge sheet and charged both with the *Murder of contrary to s. 203 as read with s. 204 of the Penal Code. It was alleged that Joshua Ndirangu Nderitu and Peter Kariuki Nderitu on the 5th November 2011 at Ngorani Village within Nyeri County jointly with others not before the court murdered Joseph Matonge Gachari*".

The accused persons took plea on the 7th February 2012 before Wakiaga J.

The specimens and the exhibits recovered were presented to the government chemist for analysis accompanied by a copy of the exhibit memo. This was done by PW10 **Grace Nyakio Njenga** who also produced a copy of the analysis report.

She testified that she received the suspected poison, liver, stomach, blood and kidneys of the deceased. She was to ascertain whether there was any poisonous substance in them. She '*found carbofuran or furandan a carbamate pesticide ...the suspected poison in the stomach of the deceased.*' She stated that '*carbamates are poisonous and may be harmful to humans if ingested*'.

She also detected alcohol at a concentration of 231mg per 100mls.

On cross examination, it turned out that according to the Exhibit Memo the police had presented the items recovered from the house of the 1st accused person, the jacket and the cap which were to be examined to ascertain whether the DNA of sweats on the two matched the DNA from the specimens obtained from the deceased. She however denied having received them despite their being noted in the Memo.

She also stated that the ingestion of furandan could cause death.

Even with that the report she produced was challenged for its authenticity. It was a copy. The original according to her was posted to the police. Someone she did not know had certified and stamped the copy as a true copy of the original. This certification was dated 18th March 2016, though the original was indicated as having been made on the 28th November 2012.

The matter proceeded before Mativo J on 12th February 2016. He heard four witnesses. The matter landed in my docket on 16th March 2017. I heard 12 witnesses.

At the close of the case for the prosecution, based on the foregoing evidence, the issue is whether a prima facie case has been established against the two accused to warrant each of both being placed on their defence.

Counsel for the accused filed written submissions. That state made oral submissions while counsel highlighted their submissions.

The position of the prosecution is that the deceased entered Vine yard Bar on the 5th November 2011 while alive. He was seen drinking with the two accused persons. That they were the last persons to be seen with him alive. That when his body was found, and the accused were the immediate suspects, the 1st accused was found in possession of clothing items belonging to the deceased. This according to the prosecution was sufficient circumstantial evidence to warrant the accused being placed on their defence.

For the 1st accused it was submitted that the case was based on pure suspicion which could not hold as was decided in **Sawe vs. Republic (2003) KLR 364.**

For the 2nd accused it was also submitted that there was insufficient evidence to warrant accused being put on the defence. The defence relied on **Bhatt vs. R (1957) 332.**

It was also urged that for a prima facie case to be established the prosecution ought to have established the three ingredients of the offence of murder as was held in **R vs. Bernard Obunga Obunga [2015] eKLR** viz; that the accused persons carried out an unlawful act or omission, that in so doing they caused harm to the deceased which led to his death, and that they had malice aforethought. In addition prosecution had to establish that there was a common intention as defined by s. 21 of the Penal Code between the accused persons to commit the murder. It was argued that the prosecution had not established the cause of death, that the accused persons caused the death. That the prosecution relied a lot on hearsay evidence which was not admissible and persons identified only as informants whose evidence was worthless as was held in **Kigecha Njuga vs R (1965) E.A 773.**

I have carefully considered all the evidence and the submissions by each counsel.

It is in **RAMANLAL TRAMBAKLAL BHATT -VS- REPUBLIC (1957) E.A. 332** that the court held as follows: -

"(i) The onus is on the prosecution to prove its case beyond reasonable doubt and a prima facie case is not made out if at the close of the prosecution, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.

"(ii) The question whether there is a case to answer cannot depend only on whether there is 'some' evidence irrespective of its credibility or weight sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence."

It is not in dispute that the body of Joseph Mathenge was found while he was already dead in an arrow root farm next to the river. It is also not in dispute that a sachet of furandan pesticide which is a poison if ingested by human beings was found next to his body. Evidence on record is that death could have been by strangulation, or severe injuries to the chest and head, or poisoning. There is evidence that on the night of 5th November 2011 the deceased was drinking with the two accused persons at Vineyard Bar at Kagonye. PW8 the brother to the deceased testified that the only reason he connected the death of his brother and the two accused is because he saw them drinking together on that night. He did not know what time they left the bar, how they left the bar or with whom his brother left the bar or where he went. The bar man PW11 also testified to only seeing and serving the four of them with drinks, that the deceased, his brother PW8 and the two accused. He saw the PW8 leave earlier than the others but never saw what time the others left.

With regard to the 1st accused PW8 connected him because he was found in possession of what he identified as his brother's cap and jacket. He rejected the cap that was produced in court as not belonging to his brother. At the same time the Investigating Officer confirmed that statements were recorded from the mother and sister of the 1st accused person that they heard a commotion in their compound on the night of 5th November 2011, and in the morning the mother to 1st accused recovered a jacket and a cap near her gate. These items were found in the 1st accused's house and according to the I.O the 1st accused told him straight away that they belonged to the deceased. They were not hidden but kept on top of other clothes next to the 1st accused's bed. These are the same items the police and the government analyst could not agree as to whether they were presented for DNA analysis or not. According to the government they were not examined, hence no connection with the deceased was established. It is noteworthy that the prosecution shut out this evidence by not calling the two witnesses.

The other connection to the murder was through PW9 Zipporah Wanjiru Karimi the deceased's sister. She testified that the 1st accused issued a threat to the deceased through a phone call she received while the deceased's phone was charging in her shop on the 28th October 2011.

The 1st accused's phone was taken as an exhibit by the police on the 10th when he was arrested from his house. That mobile phone was not described. Its make is not known, evidence that it belonged to the 1st accused person. The court was not told whether any forensics were carried out on the phone to confirm the alleged phone calls from the 1st accused's number to the deceased's phone. The police did not produce evidence to confirm that the cell phone number given by PW9 was registered in the name of the 1st accused or that the sim card bearing that number was in that mobile phone, or whether the alleged conversation as alleged by PW9 ever took place. This could have been cross checked with the deceased's mobile phone in the event that the 1st accused may have erased his call records. There is no evidence that the deceased's phone was examined. That mobile phone was not produced as exhibit but returned to the accused person because the I.O realised he could get the information from the service providers, which he never did. The court can only draw the inference that the mobile

phone did not support PW8's evidence. And all that PW8 said about any conversation with the 1st accused was hearsay. That no such conversation took place.

The other connection was an alleged quarrel mentioned by the I.O between the deceased and the 1st accused at Vineyard Bar on the material night because deceased allegedly refused to buy the 1st accused beer. Not even the bar man witnessed this fight. The I.O said he learnt about this from the 2nd accused. This evidence was contradicted by the deceased's brother and the bar man himself who said the drinking was peaceful. When challenged to point out the statement in the police file, he perused the entire file and told the court he could not trace any statement that there had been an altercation between the 1st accused and the deceased.

The deceased was last seen alive on the 5th November 2011 at around 9:00pm. The time of death is placed at an unknown time between 5th and 7th November 2011 at 6:00pm. That is a long time which the investigators did not account for in their investigations, but were quickly arrived at the conclusions that he was brutally beaten then forced to drink furandan and that there is circumstantial evidence that it is the accused persons who either strangled him, of hit him or forced him to drink poison.

Where is that evidence?

There is no evidence that the investigators even attempted to find out where each of the suspects including the PW8, the deceased himself and the bar man were on the material night between 9:30pm and 7th Nov 2011 as the deceased could have been killed at any time between those hours. There is no evidence of any investigations apart from arresting the two suspects, collecting the exhibits and sending them to the government analyst. In fact the I.O testified under cross examination that '*...we later learnt that (the furandan pesticide) was maliciously planted [at the scene] to hood wink the investigators*' that the deceased had died of poisoning. He did not say from whom they got this learning, but his statement was contradicted by the government analysts report that the deceased had indeed ingested the poison so it had not just been planted there. He said there were no signs of a struggle at the scene, yet there were no investigations as to whether death could have occurred elsewhere and the body dumped there. That the deceased's clothes did not have blood stains.

Why would the accused persons want to kill the deceased? The witnesses said they were friends. Those who saw them together on that said they were drinking peacefully. The government analyst said the alcohol content in the deceased's blood indicated a consumption of 6 to 6 ½ bottles of beer. There was no bad blood. Section 21 of the Penal Code provides for joint purpose in the following terms:

Joint offenders in prosecution of common purpose

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

There was no effort put in the investigations to establish this common intention on the part of the two accused persons to commit this offence or do anything to the deceased.

Neither mens rea nor actus reus has been established.

What the prosecution acted upon was pure suspicion, merely because it was alleged that the last persons to be seen with the deceased while still alive were the accused. I need not belabor the points made in two cases cited with approval in **Sawe v R**. First **R vs. Kipkering & Another 16 EACA 135**

'In order to justify the inference of guilt, the exculpatory act must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

And in **Mary Wanjuku Gichira v R Criminal Appeal no. 17 of 1998**

Where the court stated:

...suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence...

This case was poorly investigated. The evidence falls short of what is required for being based purely on suspicion with nothing pointing either directly or indirectly at the two accused persons.

Sadly, a life was lost. The two accused have faced this charge. The matter had been in the system for the last eight years. Both sides having been waiting, too long I say, for justice. For family of the deceased justice would be served when the truth about how the deceased met his death comes out, and those guilty of causing it brought to book, that found, tried, found guilty, convicted and sentenced. It is the duty of the prosecution to provide this evidence to required standard. It is a very high standard where the accused is presumed innocent until that standard is met. The reality is 'dead men tell no tales' so we must find out what happened through the means given to us by the law. In this case that evidence was not available. On the other hand, the accused persons expect a trial that is conducted within the confines of the law.

The law is that where the evidence comes short a finding of not guilty be made. That is the purport of s. 306(1) of the CPC. Having considered all the evidence and submissions before me, I find that the only option available to me is to make a finding of not guilty under s. 306(1) of the CPC with respect to each accused person, which I hereby do.

Dated, delivered and signed in open court at Nyeri this 23rd day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Jerusha

Accused persons.

Mr.Njuguna for Accused 1

Mr.Ombongi for 2nd Accused.

Mumbua T Matheka

Judge

23/1/19