



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL CASE NO. 10 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK GITHAIGA MWANGI.....1ST ACCUSED

AGNES GATHIGIA MWANGI.....2ND ACCUSED

RULING

The two accused persons PATRICK GITHAIGA MWANGI and AGNES GATHIGIA MWANGI are charged with murder c/s 203 as read with s. 204 of the Penal Code. According to the information dated 18th December 2017, on 18th November 2017, at Kerichu Market, they jointly murdered HUMPHREY MAINA KABUTHA.

The prosecution led by Mr. Kennedy Magoma prosecution counsel called 8 witnesses. The defence was conducted by Ms. Wambui Mwai for 1st accused and Ms. Lucy Mwai for the 2nd accused.

The case for the prosecution was that on the 29th November 2017 a report was made to the Police at Kiganjo Police Station by the wife to the deceased **PW3 Lilian Muthoni Kabutha**, that her husband had died while undergoing treatment at Karatina District Hospital. Her report was that he had told her that he was assaulted by unknown people on the 19th November 2017. The report was received by **PW8 no. 235550 Inspector Ishmael Githinji** who advised that a postmortem be conducted to determine the cause of death since the burial was planned for the 30th November 2017.

On 30th November 2017, the postmortem was conducted by **PW2 Dr. Stephen Wang'ombe Nderitu**. He testified that the deceased was 57 years old. The body was identified by **Dadson Gituto Maina PW6** and another. On external examination he observed dried blood on nostrils and left ear, multiple bruises on the face head and left knee. He found a fracture at the base of the skull which had bled into the cranium, a subdural hematoma. He formed the opinion that cause of death was '*severe head injury secondary to blunt head trauma*'. Time of death 23rd November 2017. He could not ascertain the age of the injuries. The history he received at the postmortem was that the deceased's injuries were from an assault by two unknown people, and that the deceased was taken to Karatina District Hospital where he succumbed while undergoing treatment.

PW3's testimony was that on the 18th November 2017, her husband left home for Kerichu Shopping centre. He came back the following day at 6:00am. When she opened the door for him, she saw that his face was completely swollen and he was nose bleeding. She asked him twice who had beaten him and twice his response twice: I do not know.

She told him to lie down and rest while she warmed water for his bath.

Just then, one of the deceased's cousins by the name Nderitu arrived asking for him, saying that he had heard that the deceased had been assaulted. She told him he was sleeping. He told her that they wanted to take him to hospital. It was then that one Murage i.e. **PW4 Joseph Murage Kariuki** gave her the deceased's dentures. Murage told the court that the deceased was an employee of Nyekicha Sacco. On that 19th morning he heard from some customers that there was blood and dentures along the path leading to Kerichu village. On reaching there he found the dentures which he said belonged to the deceased, picked and went with to Kabutha's home and handed them over to his wife. He noted Kabutha's swollen face.

On cross examination he said nobody saw him collect the dentures from the scene, that when he collected them nobody else was there, and there was nothing specific about them to say they were Kabutha's. That he learnt about the scene of the assault from two women. That the police did not ask him about them. That the scene was a clear place visible from his shop, a bit far from the houses in the village and even if

one raised alarm the same would not be heard in the village. He said that he took Kabutha to their Sacco chairman on Dickson Maina Kabira to be assisted.

Kabutha's wife testified that PW4 and Kabutha's cousin left with him. Kabutha came back at 1:00pm and upon enquiry he told her that they had not gone to hospital but that he had bought some medicine. He slept.

On 20th he took his medicine which were actually pain killers and she sponged his face with warm water. The nosebleed had stopped.

That night about 3:00am he began to convulse. She and his sister one Wahito called a taxi and took him to PGH Nyeri. There were no beds available so they took him to Karatina where he was admitted. By 22nd November, he was not talking. A head scan was done. She bought the prescribed medication. On 23rd the Doctor told them he would be out in three days. When they went back the following day they found he had passed away that same evening. She went back home.

It is on 29th November 2017 when they were planning the funeral that the elders asked her whether she had made a report to the police and she said no. That is when they told her to make the report.

According to PW8 on 1st December 2017 he received information that the deceased was assaulted by known people and indeed there were eye witnesses. He summoned the witnesses Stephen Gatheca Milele, Jane Wacera Kariuki and Moses Githaiga Wangu a first cousin to the accused.

Jane Wacera Kariuki was PW5. She said that on 19th November 2017 at 8:00am she was talking on her phone at Karechu shopping Centre. The 2nd accused who was an acquaintance, found her, waited for her to finish her phone conversation, only to ask her where she was the previous night, while she 2nd accused and others were looking for a motor vehicle to take Kabutha who was working at Nyeri stage to hospital. She said 2nd accused told her Kabutha had been assaulted but strangely she never asked her who had assaulted Kabutha, or any details about the alleged assault. Coincidentally just then, the 1st accused arrived saying that he was on his way to tell 'Patrick's mother' to stop associating him with bad things'. PW5 then left the two of them there.

On cross examination she said she was seated somewhere at Kerichu shopping centre and not her home when she was talking on the phone. That the 2nd accused just asked her where she was at midnight.

She said by 11:00am there was talk about the scene of the assault but no one was being mentioned in connection with the assault. She said the scene was in a built up area and if the victim had raised alarm, people would have heard.

Stephen Gatheca was PW7. He started by telling the court that 'Patrick Gathiga hit Kabutha at Nyeri stage'. On further testimony the witness stated that he found Patrick beating Kabutha with a metal bar while taking money. That it was at Kerichu at Peter Waihuki's place at midnight. He said he went and looked for a motor cycle to take Kabutha away. The motorcycle came and he left both Kabutha and Gathiga there.

On cross examination the witness told the court that he had gone to Kerichu market at that time to do the work of offloading chicken feed from lorries. It was midnight and he was alone. He just stood and watched. That it was the two accused persons. He said the 2nd accused was in a blue dress, and Kabutha in a suit and black shoes. That the boda boda rider he called whose name he gave as Maina refused to ferry Kabutha. He said one Mutahi Wag'onde told him what to come and say in court. That though he saw the assault he never told anyone, neither Kabutha's wife, nor the police nor anyone at all before the 2nd December 2017 when he recorded his statement. In the same breath he said he called one Maina wa Kabira brother to Kabutha. He said he knew the two accused as they come from the same place.

PW8 relied on the evidence of PW7 and proceeded to arrest the two accused persons. They were presented to the psychiatrist **PW1 Dr. Moses Richu Mwenda** on 7th December 2017, who confirmed that they were fit to stand trial.

On cross examination PW8 the Investigating Officer told the court that he believed the evidence of PW7. He said the witness had to be looked for and brought to the station. He said he did not confirm his coherence but only recorded his statement. Asked whether he found out why the witnesses had not reported before the 1st of December 2017, he said there was fear of one of the suspects, whom he did not name. He said the witness never told him he tried to assist the deceased or that he called a motorcycle to ferry the deceased away from the scene.

With regard to 2nd accused he told the court that he was aware she was married and had an infant child at the time. He said he did not ask her where she was on the material night or what she was doing outside at midnight on that day. He conceded that 2nd accused recorded statement under inquiry and said that she was home the whole day and only heard that the deceased had been assaulted. He also said the witness told him he was going home from work that night. He said he could not disclose how he came to know that the PW7 was at the scene on the material night.

Upon the close of the case for the prosecution the defence submitted that the state had not established a case to warrant the accused persons being put on the defence. That the ingredients of the offence had not been established and, that the evidence could not found a conviction. For the 1st accused I was referred to the case of **R v Silas Magongo Onzere alias Fredrick Namema [2017] eKLR**. For the state it was argued that the PW7 was a credible witness who had seen the two accused beat and rob the deceased.

I have carefully considered the evidence as set herein above and the submissions by counsel as provided for by s. 306(1) and 306(2) of the CPC that at the close of the case for the prosecution the court shall consider the evidence and any arguments by the counsel for the accused person and if it considers that there is no evidence that the accused or any one of several accused committed the offence shall record a

finding of not guilty. If on the other hand the court considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, the court shall inform each such accused person of his or her right to address the court, either personally or by his advocate (if any), to give evidence on his/her own behalf, or to make an unsworn statement, and to call witnesses in his/her defence.

The ingredients for the offence of murder have been set out in numerous authorities for example see **Republic -Vs- Andrew Moete Omwenga (2009) eKLR** and these the prosecution must establish:

1. The death of the victim
2. By the unlawful act or omission of the accused
3. With malice aforethought as defined under s. 206 of the Penal code which include:
 - i. The intention to kill
 - ii. The intent to do or cause harm
 - iii. Knowledge that the act or omission will cause death or grievous harm
 - iv. The intention to commit a felony

The only issue for determination is whether a prima facie case has been made sufficient enough to warrant the accused to put on the defence.

In our courts the definition of prima facie case is as found in case law including **Bhatt v R** as none is found in the law itself. In the **Silas Magongo** case the judge cited from **May v O'Sullivan [1955] 92 CLR 654** where the court stated:

“when at the close of the case for the prosecution a submission is made that there is no case to answer, the question to be answered is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law”

And also from the case of **R vs Prazad [1979] 2A CRIM R45 King CJ**

“I have no doubt that a tribunal which is a judge of both law and fact, may dismiss a charge at any time after the close of the case for prosecution, notwithstanding that there evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight that no reasonable tribunal could convict on it.”

These are the same words of the court in **Bhatt v R**. Applying these principles what is the position in this case?

There is no doubt that the deceased did not die of natural causes. The cause of death as established by the pathologist who conducted the postmortem confirms that there was a fracture of the skull. The wife to the deceased testified he had arrived home on the morning of 19th November 2017 with a swollen face bleeding, from the nose. However certain questions arise. He could not establish the age of the injuries. The prosecution did not produce any evidence to show the kind of injuries the deceased was admitted with and whether during the treatment the doctors were able to ascertain the age on the injuries. How would the court establish whether between the morning of 19th November 2017 and the date the deceased was taken to hospital no other injuries had been inflicted on him? The position of the state is that the deceased succumbed to the injuries allegedly sustained on the night of 18th /19th November 2017 and was admitted in hospital but produced no evidence of such admission, and the kind of injuries, history, treatment etc. Why?

So who caused the death?

It was alleged the deceased was assaulted on the night of 18th November 2011. He came home on the morning of 19th November 2017. He was talking. He spoke with his wife, and his sister Wahito. He told his wife he did not know his assailants, he spoke to his cousin, and to PW4 and other persons that day. None of them testified that he mentioned the person or persons who assaulted him, or that he was assaulted. Everyone made the assumption that the injuries could only have come from an assault yet the victim said nothing of the sort. Even the history given during the postmortem and at the hospital when he was admitted was that he was assaulted by unknown persons.

The Prosecution relied on PW5's testimony. In my view it through as suspect, leaving out crucial information. She said the 2nd accused was only an acquaintance. Not a close friend. Not a confidant. Why would she choose PW5 to share such information with? PW5 did not lay a basis as to why the 2nd accused would choose her of all the people in Kerichu Market to just ask her that question. PW5 suggested that she knew the deceased. Would she not have been interested in knowing what happened? who assaulted him? Which hospital he was taken to? How was he faring etc? This disinterest creates the impression that the alleged conversation did not take place. The scenario created is not realistic. It is not credible. It is not believable that the 2nd accused would leave the story where PW5 alleges without PW5 wanting to know more. It is not believable that she was satisfied with the little or no information she allegedly got from the 2nd accused. And what was this coincidence that the 1st accused would just arrive as she was leaving? She did not give any evidence to connect the 1st accused with the offence except that he arrived as they were finishing their talk with 2nd accused.

Then there was PW4. He heard about an assault from some two women who were his customers in his shop. That there was blood and dentures at a certain place. He went to collect the dentures alone. He did not say how he identified them as belonging to the deceased. There was no mention of the deceased's missing teeth by the pathologist. These women did not testify, yet they appear to have been the first persons to notice the scene that morning. His evidence was not corroborated by any other witness that the dentures belonged to the deceased as even his wife PW3 did not mention that when deceased came home he did not have his dentures. This witness conceded that the police did not interrogate him on the source of his information, a clear indication of poor investigations.

In addition, this witness left out crucial evidence. He took Kabutha from his home to take him to hospital. He is the only one who knew where they took the deceased and the one who could have explained what happened after they left with Kabutha. He knew Kabutha had been assaulted yet he did not take him to the police station to report. Where is this mysterious place they took him to and why? The prosecution were satisfied with him just saying that he had collected the deceased's dentures from the scene, then took the deceased from his home to an unknown place, the deceased returned without having been treated but on the same night his condition deteriorated. Why was this man, not investigated? Where did he take the deceased if not to hospital? Why was the I.O not keen on following up on this? His evidence left unexplained gaps which were crucial to this court arriving at the truth of the matter.

The evidence of PW7 was challenged in submissions from several angles. First it was his incoherence. He said he would Kiswahili. However, used Kikuyu and Kiswahili intermittently in such a manner that it was difficult even for the prosecutor to communicate during examination in chief. The court had to intervene so as to understand him by allowing him to testify through question and answer as his narrative were not coherent. In the end the record reflects what could be captured as this was the prosecution's star witness.

The state submitted that this witness saw the accused persons attack and rob the deceased. The witness alluded to this by say that 'Githaiga was taking money'. However, that was all. He never described the alleged robbery or how the assault took place despite saying a metal bar was used. Who between the two accused hit the deceased? Where was the deceased hit? Where was the money being taken from? What was being said during the alleged robbery? It is noteworthy that the deceased did not mention any robbery of himself to his wife or to PW4 or any other witness. This issue of the robbery was only mentioned during Mr. Magoma's submissions. To that extent it amounts to evidence from the bar.

Then it was the issue of identification. It was necessary for the prosecution to establish that it was the two accused persons that the PW7 allegedly saw at the alleged scene of crime. He tried to describe the scene, and the participants. There were two other witnesses he mentioned in his evidenced in chief, the boda boda rider and the deceased's brother. PW8 said that this witness never mentioned those two witnesses to him. How then can his evidence be credible? As a sole witness it would be dangerous to rely on his evidence without corroboration as it contains obvious inconsistencies.

I quote, in agreement the words of the judge in **Daniel Kipyegon Ng'eno v Republic [2018] eKLR** on the issue of identification:

In Charles O. Maitanyi vs Republic, {1988-92} 2 KAR 75.

it was held inter alia that it is necessary to test the evidence of a single witness respecting to identification, and that great care should be exercised and absence of collaboration should be treated with great care.

In Kariuki Njiru & 7 others vs Republic, Criminal Appeal no. 6 of 2001 (Unreported) the court held inter alia that the "law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

PW7 said it was dark. It was midnight. His testimony on the distance from where he was watching the incident, the amount of light, how far it was in relation the persons he said he saw, its intensity was either not there at all or vague. In fact it is Mr. Magoma who brought up the issue of a bright moon in his submissions. The witness never mentioned the moon or how bright it was during his testimony. The defence referred to the case of **Republic vs. Turnbull (1967) 3 ALL ER 549** where the necessity for the court to establish the presence and nature of the light, its source, intensity and location with regard to the accused, including the time taken by the witness to observe the offence being committed. A glance at the PW7's testimony will clearly demonstrate that the state did not address any of those key issues, leaving glaring gaps in the PW7's evidence. This is more so because at some point PW7 stated that a certain specified person had told him what to come and tell the court.

Was PW7 a witness of truth? He did not voluntarily record his statement. The I.O had to send someone to bring him to the station. From 18th November 2017 to 2nd December 2017 is a long time for a person to keep such information to himself and not tell a single person. The prosecution did not explain this delay in telling the story yet the witness alleged that he knew the deceased well, he knew the suspects and even where they lived and must have known that the deceased was in hospital. The I.O casually stated that the reason for the delay was fear 'of one of the suspects'. He did not specify which suspect was being feared and why. This delay and the lack of an explanation, and the conduct of PW4 and others,

Secondly were all the eye witnesses fearful? According to PW7 he called the boda boda rider and a brother of the deceased both of whom came to the scene and found the suspects and the deceased there. He does not state that there was any altercation between him and any one at the scene. He left all of them including the accused persons at the scene and went home. He did not say in his evidence that anyone had told him not to say what he had seen. The issue of witness fear came from PW8 the I.O and had no basis whatsoever. And while it is the prerogative of the prosecution to call whoever they wish as witnesses as per s. 143 of the Evidence Act, these two other witnesses were crucial to answer the question of the identity of the deceased's assailants, and the riddle why the deceased would say to his wife he did not know who had assaulted him.

The I.O did not explain why he left out such crucial evidence choosing instead to rely on the incoherent evidence of a single witness PW7.

In Daniel **Kipyegon Ng'eno** above the judge also dealt with the issue of a single witness and had this to say:

*A similar position was reiterated by the Court of Appeal of Tanzania in **Ahmad Omari vs The Republic Criminal Appeal No. 154 of 2005**, Ramadhani C.J, Munuo JA and Mjasiri J.A. Also discussing the same issue, the Court of Appeal of Uganda in **Okwang Peter vs Uganda Criminal Appeal No. 104 of 1999** held as follows: -*

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favoring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error.

The evidence of PW7 was tainted with incoherence, uncertainty and self-contradiction. It is not reliable evidence by itself and in my view required the corroboration of witnesses who were said to have been present and whose failure to testify was not explained. In the circumstance the court can and is at liberty to draw the deduction that these witness would not have supported the case for the prosecution and that is why they did not call them.

What about malice aforethought and common intention?

The prosecution also did not establish malice afore thought on the part of the accused persons. No evidence on intention to kill the deceased or to commit or actual commission of the alleged offence of robbery was tendered. Neither did the state establish the common intention as required by Section 21 of the Penal Code.

Finally, and sadly, there was poor to no investigation of the matter. The officer relied on stories he was told by people he did not disclose about the knowledge by PW5 and PW7. Even when he recorded their statements he did nothing to follow the leads. For example, he did not establish the first allegation in this case- that the alleged assault of the deceased. According to his wife the deceased took alcohol. Where did he drink on the night of 18th? In whose company? Were there hospital documents that the deceased was admitted on the 21st November 2017 and died on 23rd November 2017? Or was the story of the alleged assault on 18th/19th a cover up for something that happened on the night of 20th/21st leading to the admission of the deceased in hospital with injuries? Why was the deceased’s alleged sister Wahito not called? Or the taxi driver who allegedly took the deceased to hospital? All these are questions that arise out of the witnesses who testified, questions the investigator ought to have answered in order to have a prima facie case.

He relied on very suspicious evidence that appears to have been put out there to create suspicion. The court of Appeal in the case of **Sawe vs R [2003] KLR 364** had this to say:

Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

The prosecution relied on the evidence given by PW5. The alleged conversation with her is denied by the 2nd accused person. The I.O termed that alleged conversation as a ‘confession’ by the 2nd accused that she was at the scene of the assault. He proceeded to record her statement under inquiry where she denied being anywhere near the scene or out of her house on the material night. The alleged conversation does not qualify as a confession as envisaged by the law. It was up to the prosecution to avail evidence to prove it took place.

Hence the prosecution failed to establish that the two accused persons indeed assaulted the deceased on the night of the 18th/ 19th November 2017.

In conclusion, and from the foregoing I find that the evidence before me falls short of what can answer to ‘prima facie case’, and have the accused persons called upon to put out their defence. I therefore make a finding of not guilty for each accused as provided for under s. 306(1) of the CPC.

Dated, delivered and signed at Nyeri this 28th day of February 2019.

Mumbua T.Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Ms.Jebet for state

Ms.Ndegwa for Ms.Mwai for Accused 2

Mumbua T.Matheka

Judge

