



**REPUBLIC OF KENYA**

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

**CRIMINAL MURDER NO. 6 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ANDREW NJAGI GICHOBI.....ACCUSED**

**JUDGMENT**

1. The accused person **ANDREW NJAGI GICHOBI** (to be referred to herein as “the accused) is charged with the offence of murder contrary to ***Section 203 as read with Section 204 of the Penal Code.*** It is alleged that on 6.2.2010 at Mwambo village of Kajuu Sub-location, Kirinyaga East District within Kirinyaga County, murdered George Njogu Wanja.

2. The accused person denied the charge.

3. The facts of the case are that on 6.2.2010 the deceased George Njogu Wanja was met by Anthony Muriuki (PW-1-) standing by the roadside with another person by name Ndungu. The two informed him that the deceased was hit by Andrew Njagi who is the accused in this case. The deceased had an injury on the head and was bleeding from the eye. PW-1- and Ndungu assisted the deceased and took him to the home of Ndungu where they gave him first aid then escorted him to his home.

The deceased met his mother Julieta Wanja Sammy (PW-2-).

The PW-1- and Ndungu informed PW-2- that the deceased was hit by Njagi, the accused in this case. PW-2- and the deceased proceeded to Gathoge Police Post where the matter was reported. The deceased then went home.

4. The next day he was escorted to Embu General Hospital where an X-ray was done. The deceased was referred to Kenyatta National Hospital where he succumbed to the injuries on 8.2.10. Police were informed and started looking for the accused. It was discovered that the accused had disappeared from his home and only resurfaced in May 2014. He was arrested and charged with this offence.

5. A post mortem was done at Kibugi Funeral Home by Doctor Gathang’i. The doctor found that the deceased had a depressed skull fracture on the frontal bone 3 cm in diameter. There was also a large subdural hematoma beneath the fracture. The cause of the death was severe head injury following a heavy blow to the forehead as a result of assault.

6. The accused denied the charge and in his unsworn defence told the court that he did not know how the death of the deceased occurred. He said on the material day he was at home.

7. I have considered the evidence adduced and the submissions which were made by the prosecution and defence counsel. The issue of determination is whether the accused is the one who caused the death of the deceased with malice aforethought.

8. From the evidence tendered by the prosecution, there was no eye witness account as to what transpired or how the injury on the deceased was inflicted. The question is whether there is strong circumstantial evidence adduced by the prosecution to prove the charge against the accused.

9. There is circumstantial evidence which tends to point to the guilt of the accused. The evidence by PW-1- is that on 6.2.2010 at 9.30 pm while on his way home from Mwambau Shopping Centre he met the deceased and one person by name Ndungu. PW-1- testified that the deceased had an injury which Ndungu told him he thought the person who hit George was the accused.

10. PW-2- is the mother of the deceased who testified that PW-1- and a man called Ndungu escorted the deceased to her home. The deceased had an injury and on inquiry Ndungu informed her that it was Njagi (accused) who had injured the deceased. It was the testimony of PW-2- that the deceased disclosed to her that it was the accused Njagi who had injured him.

11. PW-3- is the sister to the deceased. On 6.2.10 at about 10.00 pm she requested the deceased to escort her to Gathoge market because it was at night. After a while the deceased called Henry Ndungu. The deceased left her on the road and went to Ndungu's house. She waited for him on the road. The deceased delayed so she decided to go alone. After walking for 50 metres, she met Andrew Njagi and Anthony Muriuki. She went to her house. The next day she heard that Njagi had hit his brother George.

12. PW-6-Geoffrey Mungatha testified on 7.2.10 he was at Gathoge patrol base when the complainant (deceased) and his mother went to the Police Post. The deceased reported a case of assault. The deceased had reported that accused is the one who had assaulted him. The deceased mentioned the name of the accused 'Njagi' as the person who had assaulted him.

13. This is the summary of the evidence as the other witnesses are formal witnesses – the doctor who performed the postmortem and the psychiatrist who examined the accused and confirmed that he was fit to stand trial.

14. There is no direct evidence, the prosecution has relied on circumstantial evidence. What constitutes circumstantial evidence has been the subject of judicial consideration.

In **Chege -V- Republic 1985 KLR 1** the Court of Appeal stated as follows:-

***“The general rule on which a dying declaration is admitted in evidence is that it is a declaration made in extremity when the maker is at the point of death and the mind is induced by the most powerful consideration to tell the truth.***

***There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person.***

The Court of Appeal in **Sawe -V- Republic (2003) KLR**

It was held:

***“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 on any hypothesis other than that of his guilt.***

***Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances relied on.***

***The burden of proving facts which justify the drawing into this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution.***

***This burden always remains with the prosecution and never shifts to the accused. Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubts”.***

The Court of Appeal has set out the principles to apply in order to determine whether the circumstantial evidence adduced in a case is sufficient to sustain a conviction. In the case of **Abanga alias Onyango -V- Republic Criminal Appeal No. 32/1990 UR**

The court held:

***“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, unerring pointing towards 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 no one else”.***

15. From the evidence of the witnesses which I have analyzed above, PW-3- who was a sister to the deceased heard him making a call to Ndungu. Later PW-3- found Andrew Njagi and Anthony Muriuki on the side of the road. This shows that the accused was in that area that material night.

The evidence of PW-2- shows that the deceased came home with an injury and when he asked him, the deceased told her that he was assaulted by Njagi. PW-2- knew Njagi who is the accused in this case. PW-2- escorted the deceased to the Police Station and he made a report to PW-6- that the person who injured him was Njagi the accused in this case.

16. This evidence shows that the deceased had identified the accused as the person who had assaulted him. The deceased died a day after the assault. The accused disappeared immediately after the deceased passed away. This buttresses the dying declaration by the deceased. The post mortem form and the evidence by Dr. Gatang'i shows that the deceased was assaulted. PW-5-, doctor Gatang'i testified that the deceased had a cut on the forehead. The cut was deep. There was a fracture on the scalp and bleeding beneath the underlying of the brain. The cause of death was severe head injury following a heavy blow to the forehead. This was inflicted by a 3<sup>rd</sup> party. The evidence shows

that the injury was as a result of assault.

17. I find that the prosecution has adduced strong circumstantial evidence which has proved the charge against the accused beyond any reasonable doubts.

18. I have considered the defence of the accused. The accused had no burden to prove his defence of alibi. I reject the defence as the PW-3 placed him at the scene of crime. The deceased was assaulted soon thereafter and reported to his mother and police that accused assaulted him. The defence of the accused is not credible. He said he was at home that night, yet upon the death of the deceased he disappeared from home for four years. The inference to be drawn is that he disappeared from home to evade arrest after committing the crime. The dying declarations by the deceased are admissible to base a conviction.

Section 206 of the Penal Code provides:

*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.*

The section provides for circumstances which constitute malice aforethought. The offence of murder is committed when one unlawfully causes the death of another by an unlawful act or omission with malice aforethought. The prosecution must prove that when the accused assaulted the deceased he had formed the necessary motive to cause death of grievous harm to the deceased.

19. The prosecution has proved that the accused had malice aforethought as the injury inflicted was serious. The intention by the accused was to cause grievous harm. PW-6- the police officer testified that the dispute was over Ksh.50/=. The deceased had taken a hat belonging to the accused because of the debt.

20. I have considered the submissions by the defence counsel on the circumstantial evidence. I find that there is sufficient circumstantial evidence to base a conviction. The defence of the accused was not plausible.

**21. In conclusion:**

I have given reasons for the finding that there is strong circumstantial evidence tendered by the prosecution which proves the charge against the accused beyond any reasonable doubts. I therefore find the accused person guilty as charged and I convict him.

**L.W. GITARI**

**JUDGE**

**31.10.2019**

Read out in open court, Accused present, Ms Magara Advocate for him, Mr. Ashimosi for the state, Court Assistant Gichia this 31.10.2019.

**Mitigation:**

The accused is remorseful.

He prays the court to consider the period he has been in custody.

He prays for a none custodial sentence. He has aged parents.

He pleads for leniency.

**Mr. Ashimosi:** I don't have his records. Treat as a 1<sup>st</sup> offender. On mitigation, going by the injury, the court to consider it as an aggravating circumstances. That is one of the principle in Muruatetu Case. Though the mandatory of death sentence has been declared unconstitutional, the death penalty is still a sentence under the law. The court to consider passing a death sentence.

**L.W. GITARI**

**JUDGE**

**Sentence:**

I have considered the mitigation.

I have also considered the statement by the prosecution counsel.

This offence is no doubt very serious and aggravated. The accused by one blow on the head of the deceased terminated the life of a young man was only 23 years old. This was reckless and must have caused a lot of pain to the family. I find that a custodial sentence is called for. The blow on the head was meant to cause death or grievous harm.

I sentence the accused to imprisonment of 30 years.

The sentence to run from the date the accused was arrested as he has been in custody.

Right of Appeal within 14 days.

**L.W. GITARI**

**JUDGE**

**31.10.2019**