



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 70 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

WILSON MWANGI GITHINJI.....1ST ACCUSED

SIMON NDAMBARI GATUMU.....2ND ACCUSED

JUDGMENT

Grace Njeri Leposo ought not to have died the way she did. Indeed no human being should meet such a fate. It would even be termed by animal lovers as cruelty to an animal if one were to be killed in this manner. Grace is a victim of a macabre murder committed by a very sick person or persons. Her murder can only be described as gruesome, horrific, horrendous and shocking. Those who killed her could not have chosen an appalling and repulsive method to do so. Her body was found inside her bedroom at Siranga in Upper Matasia, Ngong on 11th June 2013. It was lying beside the bed and it was in six pieces. The head had been decapitated from the trunk at the neck; both her upper limbs had been amputated at the shoulders and both her lower limbs had been amputated at the hips. The trunk was lying with the front side facing down. A sharp object had been used to perform this sickening act which is akin to a satanic ritual.

Grace lived alone in her timber house. Few meters from her house, Grace had constructed eight (8) iron sheet houses which she had rented out to tenants, mostly casual laborers in the area. Grace was elderly. Her age is given as 71 or 72 years. Her tenants and neighbours referred to her fondly as “cucu”, Kikuyu for “grandmother”. Her children were all grown up and had either been married or had moved away to start their lives. Anastasia Nyambura Leposo (PW1) and David Nganga Leposo (PW3) are two (2) of her seven (7) surviving children out of the ten (10) children she had born. She was a widow at the time of her death.

One Margaret Wanjiru Githinji, whom the court was told has since passed on, was one of the neighbours of the Grace. Margaret was the mother of Wilson Mwangi Githinji, the 1st accused person. Evidence shows that Margaret was living with Simon Ndambari Gatumu, the 2nd accused person, as her boyfriend. Simon had rented one of the iron sheet houses from Grace. For some time he lived in that house with Margaret Wanjiru. Wilson used to live away from his mother and the 2nd accused. This situation changed sometimes before Grace was killed. Simon was found with one bag of maize which he had spread in the sun to dry. Grace had become suspicious and had sought to know where Simon had got the maize from. Their relationship soured and although it is not clear from the evidence whether this is the reason behind the notice to leave the rented house belonging to Grace, the 2nd accused and Wanjiru were given notice by Grace to leave and they did. They however did not go far. They got a house near Grace’s residence and continued being her neighbours. Wilson used to visit his mother and used to be given odd jobs by

Grace to do at a pay.

On the Sunday before 11th June 2013, Grace was seen by one of her tenants, Julius Mulinge Makusa (PW6), going to church at about 7.00am. The 2013 calendar shows that the Sunday before 11th June 2013 was on 9th June 2013. Mulinge used to work as a night guard at Matasia Secondary School. That night he was on duty. He came home the next morning which according to the calendar was 10th June 2013. He found no electricity at their rental houses. The other tenants did not know what had caused power failure. In the evening of that day, Julius went to work at night as usual and returned in the morning of 11th June 2013. He was informed by one neighbour that one of the doors of Grace's house was open. Julius went to investigate and confirmed it was so. He called David Nganga Leposo (PW3) the son of Grace and informed him. David told Julius to go into his mother's house and find out what was wrong. Julius entered the house. He noted that the television set and some clothes had been placed on a seat. He found the dismembered body of Grace on the floor of her bedroom. He called David and told him that something was wrong in his mother's house. He asked David to go to Upper Matasia without giving him details of what was wrong. David went to Upper Matasia in company of his friends Peter Kamau and Moses Thairu (not witnesses). They observed the scene. David reported the matter at Matasia Police Station. Police arrived at the scene, secured it and photographed it. The body was collected and taken to the City Mortuary. It was examined by Dr. Dorothy Njeru (PW13) on 14th June 2013. Police carried out investigations that led to the arrest of the two accused persons. The two were charged with the murder of Grace.

The charge drawn against Wilson Mwangi Githinji and Simon Ndambari Gatumu is brought under Section 203 as read with Section 204 of the Penal Code and its particulars reads as follows:

Wilson Mwangi Githinji and Simon Ndambari Gatumu: On the 11th day of June, 2013 at Ngong Township within Nairobi County (sic) murdered Grace Njeri Leposo.

When the two accused persons were arraigned in court and the charge read to them on 3rd July 2013, each accused denied committing this offence necessitating full hearing of this case. The prosecution lined up sixteen (16) witnesses to testify against the two accused persons. The defense called two witnesses, the accused persons, to testify for the defense.

The prosecution bears the burden of proving this case against the accused persons beyond reasonable doubt. To secure a conviction against the accused persons or any of them, the prosecution must prove that the death of Grace Njeri Leposo occurred as a direct consequence of an unlawful act or omission by the accused persons or any of them with malice aforethought. The prosecution must prove malice aforethought by evidence that tends to prove that the accused persons or any of them intended to cause the death of or do grievous harm to Grace.

Without repeating what each witness told the court, it suffices to state that I have read all the evidence of all of the sixteen (16) prosecution witnesses and I have noted what role each witness played in this case. I have also read the evidence of each of the two accused persons and submissions by counsel on opposing sides. In the course of determining this case all the evidence tendered and submissions will be considered.

Did the death of Grace Njeri Leposo occur?

The answer to this question is in the affirmative. Grace Njeri Leposo did die. She met a cruel and painful death. It was unlawful death. Her body parts had been decapitated or amputated as the case may be. There is no doubt from the evidence of Nganga her son, that of Mulinge her neighbour and tenant and the police officers who visited the scene including the scenes of crime officer PC Emmanuel Ekai (PW7) that the body of the deceased was found inside her house and that it was in six pieces, the head, the two hands, the two legs and the trunk. Jane Ngonyo Ngige (PW4) and Margaret Njeri (PW5) identified the body of the deceased to Dr. Njeru who examined it and confirmed the death of the deceased. The doctor examined her body at the City Mortuary on 14th June 2013. Her evidence on her findings is that:

“Externally the head had been decapitated at the neck. Both upper limbs had been amputated at the shoulders. Both lower limbs had been amputated at the hips. Close examination at the point of amputation and decapitation showed a sharp object had been used. There were also incised wounds on the palmer aspect of both hands. Internally the major blood vessels in the neck, upper and lower limbs had been severed. There was a spinal injury at the level of the neck with total transection of the spine at the neck. Further examination did not show any other abnormalities. I formed the opinion that the cause of death was multiple injuries due to sharp force trauma.”

The findings of the doctor are captured in the Post Mortem Examination Form dated 14th June 2013 and produced in evidence as Exhibit 2. The evidence surrounding the death of the deceased adduced by witnesses and confirmed by Dr. Njeru leaves no doubts in my mind that the death of Grace Njeri Lepas has been proved beyond reasonable doubt.

Who killed Grace?

This is the major issue in this case. The answer to this question will by extension answer the question as to whether the accused persons or any of them killed her. The question calls for examination of all the relevant evidence from both the prosecution and the defense. An examination of the evidence for the prosecution reveals that there is no direct evidence to point out to who the culprit is. In the absence of such evidence this court must turn to circumstantial evidence. It is clear to me that the case for the prosecution revolves around circumstantial evidence. Anastasia testified about Simon Ndambari, the 2nd accused, as having threatened her mother Grace. She said that this was because Grace had sought to know where Simon had got the maize he was drying in the sun from. She testified to seeing Simon looking at her intently on 12th June 2013 when she went to her mother’s farm which she said terrified her. This evidence does not tell us anything that could be used to pin Simon Ndambari down as the culprit. Anastasia did not tell the court about the nature of the alleged threats or how she came to know about them.

Patricia Mukami (PW2) told the court that Wanjiru, mother to 1st accused, bought Elastoplast worth 50 shillings from her (Mukami’s) shop on 10th June 2013 and that Wanjiru told her that they were for bandaging her (Wanjiru’s) son the 1st accused who had hurt himself while slashing grass. Patricia told the court further that she saw Wanjiru bandaging the 1st accused the following day. She also testified to seeing the 1st accused three days after the death of the deceased leaving the area carrying some baggage. She testified that on 14th June 2013 she was informed by another woman (not a witness) that the woman had seen Wanjiru burning clothes in a dustbin and on being asked why she was burning them. It was alleged that among the clothes was a hat belonging to the 1st accused and that Wanjiru explained that she was burning the clothes because no one was using them. Evidence on the burning of clothes is scanty and this court cannot rely on it since the woman who witnessed the alleged burning, one mama Emmanuel, did not testify. Evidence does not show that the clothes alleged being burned belonged to the deceased.

Further evidence by Agnes Kariuki Wambugi (PW8) is that on 10th June 2013 while going to work she met Wanjiru carrying items on her back. At the time, Wanjiru was with her son the 1st accused. Agnes sought to know what Wanjiru was carrying and she was told that they were clothes for washing. This evidence would be useful if it was connected somewhat with the death of the deceased. Wanjiru was earning a living by doing casual jobs and it may not be far-fetched to have her carrying clothes to wash for her customers. In other words, without anything to show that the clothes Wanjiru was carrying had been stolen from Grace’s house, it is not wise to conclude that she or her son had anything to do with the death without evidence to that effect and for the simple reason that she was carrying those clothes.

My view after considering the evidence in totality is that the only evidence that connects the 1st accused with the death of the deceased is that touching on the cell phone (Ex. 5) that is said to belong to Grace. The court in the course of the trial dealt with a confession attributed to the 1st accused and which was said to implicate the 2nd accused. CIP James Kariuki wanted to introduce this confession into evidence against

the accused persons. This was opposed by Mrs. Nyamongo counsel for the 1st accused and Mr. Ochako counsel for the 2nd accused. An inquiry by way of a trial within the trial was conducted to determine whether that confession had been made voluntarily. The findings of this court were that the procedure in taking down the confession had not been followed. The court declined to admit the statement in evidence.

Evidence leading to the arrest of the 2nd accused person is not clear. There was mention in prosecution evidence that he was arrested together with Wanjiru but this was not clarified. In his defense the 2nd accused explained how he was arrested. The circumstances surrounding the arrest of the 1st accused person are clear. Police officers, PC Kenneth Kivisha Imbudi (PW12) CPL Ruth Wangechi (PW2 in trial within trial) and PC Joseph Cheruiyot (PW11) were instructed to travel to Karatina to arrest the 1st accused person. The evidence that the 1st accused person was arrested in Karatina sometimes after the death of Grace confirms that he had left Upper Matasia as testified that he had been seen earlier leaving Matasia carrying some baggage. The three police officers travelled to Karatina on 24th June 2013. They were accompanied by Nganga, son of Grace and a female police informer. At Karatina police station they were accompanied by some officers.

Evidence shows that the informer was in constant communication with the 1st accused and they had agreed to meet at Kobil Petrol Station in Karatina Town. The 1st accused had no idea that the police were involved. He met the informer at the Petrol Station as agreed. He was then arrested. He was searched and a cell phone, Nokia 1280, was recovered from him. Nganga recognized the phone as belonging to his mother Grace. The 1st accused was taken to Ngong Police Station.

In his defense, the 1st accused did not say anything about his arrest in Karatina. He testified under oath and told the court how he spent the day on 10th June 2013. He testified to meeting his mother carrying two bags containing clothes and shoes. He testified that his mother was going to wash the clothes she was carrying. He testified to helping his mother slash grass and getting injured when he accidentally cut himself on his three fingers and how his mother went to buy Elastoplast and bandaged his fingers. He testified to going home and going to Karen to work the following day and buying flour to share with his mother. He testified that he was arrested in Kiserian on 24th June 2013 as he was going to work. In cross examination the 1st accused told the court that his mother lived alone and that he used to go to visit her often. He told the court that the witnesses lied about him. He denied that he knew the deceased Grace or her relatives.

I do not have evidence to prove that the injuries sustained by the 1st accused and which were confirmed by the doctor who examined him as testified by Dr. Joseph Maundu (PW14) on behalf of Dr. Kamau were sustained during the causes of the murder. These injuries according to the doctor were aged 16 days at the time of examination on 25th June 2013. They were healing and were localized on the fingers of the left hand. These injuries could have been sustained during the murder but without evidence to prove this, it would amount to mere speculation on my part.

The 2nd accused testified that he was arrested on 19th June 2013 as he was going to work and he was not told why he was being arrested. He denied knowledge about the death of the deceased. He said he lived alone in Matasia in a company house where he was not paying rent.

In my view the accused persons lied about not knowing the deceased and her relatives. Several witnesses told the court that they knew both accused persons. Patricia Mukami, a neighbour of the deceased, told the court that the 1st accused was the son of Wanjiru and that the 2nd accused used to live with Wanjiru as a husband. David Nganga knew Wanjiru and her son Wilson the 1st accused. David also knew Simon as boyfriend of Wanjiru. He knew him as a former tenant of his mother Grace and that his mother had evicted Wanjiru and Simon over the maize issue. Mulinge who was one of the tenants of the deceased also knew both accused persons. He knew that the 2nd accused had rented a house from the deceased for two months and that he lived in that house with Wanjiru. Mulinge told the court that the 2nd accused had

disagreed with the deceased over the maize the 2nd accused was found with and the deceased had evicted them from her house and that they had moved into a house in the neighbourhood. Mulinge also told the court that the 1st accused used to come to visit his mother Wanjiru. Given this overwhelming evidence, it is obvious that the accused persons were lying to court about not knowing the deceased and her relatives.

That the 1st accused did not say anything about his arrest in Karatina is strange. He did not even mention the recovery of a phone Ex. 5 identified by Nganga as belonging to the deceased.

David Nganga told the court that he recognized his mother's phone when it was recovered from the 1st accused after his arrest in Karatina. PC Joseph Cheruiyot and PC Kenneth Kivisha Imbudi who went to arrest the 1st accused in Karatina in company of CPL Ruth Wangechi and David Nganga both testified to witnessing the recovery of the phone from the 1st accused after he was arrested at Karatina. I believe this evidence and reject the defense of the 1st accused that he was arrested in Kiserian. The recovery of the phone as stated above is the only credible evidence connecting the 1st accused with this offence. This evidence brings into focus what is referred to as the "**doctrine of recent possession**". In **Athuman Salim Athuman v Republic [2016] eKLR**, the Court of Appeal in reference to the doctrine of recent possession stated that:

"The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver."

The circumstances under which the doctrine of recent possession applies were considered in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic Cr. App. No. 272 of 2005 [2006] eKLR**. The Court of Appeal in that case had this to say in respect of the doctrine of recent possession:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly that, the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

In the Canadian Supreme Court case of **Republic v. Kowkyk (1988) 2 SCR 59**, the subject of the doctrine of recent possession was explored at length as considered by the Court of Appeal in **David Mugo Kimunge v Republic [2015] eKLR** and the following summary accepted:

"Upon proof of the unexplained possession of recently stolen property, the trier of fact may – but not must- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."

It is my duty as the trier of the fact of the death of the deceased in this case to subject this case to the above test and make a conclusion as to whether it meets this test or not.

Firstly, was the phone in issue found in the possession of the 1st accused? I have considered the evidence of David Nganga who accompanied police officers from Ngong Police Station to Karatina where the Wilson Mwangi Githinji, the 1st accused, was arrested. I have also considered the evidence of

PC Joseph Cheruiyot and PC Kenneth Kivisha Imbudi. The three witnesses went to Karatina. The mission of their going there was to arrest the 1st accused. CPL Ruth Wangechi was with them but she did not testify in the main trial. She testified in the Trial within Trial and her evidence was aimed at establishing that the 1st accused gave a voluntary confession. She did not mention anything about the recovery of the phone. The other three witnesses, David and the two police officers named above all testified to the recovery of the cell phone Nokia 1280 (Ex. 5) from the 1st accused after he was arrested at Karatina. The three witnesses were subjected to detailed cross-examination and they maintained that the phone in issue was recovered from the 1st accused. It was suggested to them by the defense counsel that the phone had been given to the 1st accused by the deceased as a gift. They denied this. Specifically, David told the court that his mother had only that phone and therefore she could not have given it to the 1st accused as a gift. It is worth noting that the 1st accused in his defense did not talk about the phone at all. My considered view on the matter is that I have no doubt in my mind that the phone Nokia 1280 (Ex. 5) was recovered from the 1st accused.

Secondly, did the phone belong to the deceased Grace Njeri Leposo? David told the court that he recognized Exhibit 5, a Nokia 1280, after it was recovered from the 1st accused. He testified that he is the one who had bought the phone for his mother. In cross-examination he stated that: ***“We found him with a phone. Mother could not have given 1st accused her phone. She did not have 2 phones so she could not have given him the phone as a present. I am the one who had bought the phone for mother.”***

PC Bernard Marete the Investigating Officer told the court that he recovered a receipt (Ex. 6) from the house of the deceased. The receipt is dated 15th February 2013 and it bears the name of Grace Njeri Laposo. It is in respect of Nokia 1280 IMEI No. 3553297/05/0973382 and Earphones all worth Kshs 3500. This is the IMEI number cited in court by PC Marete. I have noted that the accused persons, specifically the 1st accused, did not raise any issues with this phone or the receipt. In fact his evidence in defense did not mention anything about the recovered phone or his arrest in Karatina.

In paragraph 5 of the written submissions, counsel for the 1st accused submitted that the phone in issue was bought by Wanjiru the mother of the 1st accused for the deceased to replace a phone the deceased claimed had been stolen from her. Counsel has also attached the statement of one Pauline Wangeci Njuguna to support her submissions. Further in paragraph 6 of the said submissions, counsel submitted that recent possession does not arise because the receipt in respect of the phone was recovered from the house of the deceased and not with the 1st accused. I am disturbed by these submissions. They amount to evidence from the bar. None of the accused persons, specifically the 1st accused did testify to the issues being raised by counsel in her submissions. Further, the statement of Pauline cannot form part of the evidence in this case. She did not testify for the prosecution and the defense did not deem it fit to summon her in favour of their case. Her statement to the police was not produced in evidence and it was not tested in cross examination. It would be prejudicial and outside procedure for this court to consider the said statement.

I do not doubt the evidence by the prosecution in respect of the owner of the phone. It is my finding therefore, and I so hold, that the ownership of the phone has been positively proved. It belonged to the deceased Grace. This conclusion settles the issue of ownership of the phone.

Thirdly, was the phone stolen from the deceased? The evidence by the prosecution, specifically from David and the officers who arrested the 1st accused in Karatina as shown above in this judgment satisfies this court that the phone was stolen in the course of the attack on the deceased. There is no evidence to show that the phone was given to the 1st accused as a gift as claimed in submissions. It must have been taken during the attack when the deceased was killed.

Lastly, was the phone recently stolen from the deceased? The 1st accused was arrested on 24th June 2013. The deceased was killed before 11th June 2013 when her body was discovered. That was about two (2) weeks after the fact of death. To mind, this is recent. The trend in this country is that a stolen phone is

either sold off or used by the one who steals it. A period of two weeks after the theft is too soon and it is either that the 1st accused intended to use the phone or to look for a buyer. I am satisfied that the period between 11th June 2013 and 24th June 2013 is recent enough for our purposes in respect of this case.

I have applied my mind to the issues before me in respect of the application of the doctrine of recent possession and the evidence before me. I am satisfied that the test expounded in the cases I have cited above has been met. By the application of this doctrine this court makes an inference that the 1st accused is culpable. The 1st accused has not given any explanation, let alone a reasonable explanation, how he came by the phone. As far as he is concerned, the issue of the phone was not part of his evidence in defense. Having failed to so explain this court makes an inference that the phone must have come into his possession by participating in whatever manner in the killing of the deceased person.

Before concluding this matter, I wish to comment about the manner the investigations in this case were conducted. PC Marete did not do a good job in his investigations. To me he seemed to have been blinded by the alleged confession by the 1st accused and failed to thoroughly follow up all the leads that would have either implicated or exonerated the 2nd accused person. The 2nd accused may have participated in the murder of the deceased. However without tangible evidence to prove that he took part, this court cannot hold him to account. The manner the deceased was killed points to involvement of more than one person. From what I can gather from the evidence, it is probable that the deceased was killed anytime between Sunday the 9th June 2013 and 11th June 2013. The culprits must have taken a lot of time inside that house to complete this heinous act.

It is my finding, and I so hold, that the prosecution has proved beyond reasonable doubt that the 1st accused person participated in the death of the deceased. He must have had been in company of others. There is no evidence to prove that the 2nd accused participated in this act. As stated above his role in the death of the deceased has not been supported by evidence. That said, the only issue left unresolved is whether the 1st accused, in causing the death of the deceased, possessed malice aforethought.

I started this judgment by describing the horrid nature of the death of Grace the deceased. Any one capable of killing a human being and dismembering him/her in the manner Grace was killed must have had one intention; to kill the deceased. I do not even think the intention was to cause her grievous harm. It was outright to kill her and kill her in the most horrifying manner imaginable. It is my finding and I so hold that the ingredient of malice aforethought has been proved beyond reasonable doubt.

My conclusion is that the prosecution has proved the crime of murder against the 1st accused person, Wilson Mwangi Githinji, beyond reasonable doubt. Consequently, I find him guilty of the offence of murder contrary to section 203 as read with section 204 of the Penal Code. I find and hold that the evidence made available to this court does not prove the case against the 2nd accused person Simon Ndambari Gatumu. It is the duty of this court to record a finding of not guilty and acquit the accused person where evidence to prove him guilty is lacking. I hereby find the 2nd accused person not guilty and acquit him forthwith. Unless for any other lawful cause he is held in custody, Simon Ndambari Gatumu is free to go home. Orders shall issue accordingly.

Delivered, dated and signed this 25th day of January 2018.

S. N. Mutuku

Judge