



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO.30 OF 2012**

**REPUBLIC.....RESPONDENT**

**VERSUS**

**MOSES KARANI WAIGWA**

**DOUGLAS KURIA KARIUKI.....APPELLANTS**

**R U L I N G**

On the morning of 12<sup>th</sup> August 2012 about 6.00am, PW2 Gerald Nderitu Kihagi was called by his distraught sister Mary Wanjiku from the house “to come and see what she had seen”. She took him to the fence near their shamba where he found a dead body which he identified as that of Robert Kariuki Githithi. The body had no shoes on its feet. It had injuries on the head and neck and scratches. He rang Dickson Githaiga a cousin to the deceased and informed him.

Peter Kinuthia Mutahi (PW3) on his part was going to buy milk. He came across a person who identified as his cousin by the name Kariuki lying on the road. He called him, he did not respond. He went and told the brother to the deceased one William Matu, called another by name Mukunyi and they went back to the scene where they confirmed that it was Kariuki, and he was dead. A crowd formed. The police were called.

PW3’s observations were that the body’s feet were clean, meaning that the deceased had not stepped anywhere barefoot. He formed the opinion that the body must have been brought to the scene while already dead.

PW5 Insp. Henry Mukiria who by then was attached to Kiganjo police station arrived at the scene together with his colleagues. They identified the body as that of their fellow police officer and he rang the OCPD who told him he was sending CID officers. He remained there guarding the scene. While there he heard from members of the public that blood spots had been seen on the road.

Upon arrival the CID officers upon followed the same with members of the public. He did not accompany them but they came back and told him the blood trail had led them to a homestead where they had recovered a pair of sandals.

The evidence of the CID officers was presented by PC Peter Orwa No.77258 who was the Investigating Officer. He could not testify due to illness but his colleague No.236112 IP Maxmilla Amwatok who took over the investigation in February 2017 did as PW8. The defence had no objection to his testimony and to his production of PC Orwa’s statement which was marked as PEx 10 together with the other exhibits.

According to PC Orwa he was requested by the DCIO Mr. Longachila to accompany him to the scene of

murder at Gachira area. They found the body of the deceased, and officers from Kiganjo police station at the scene. He stated that the deceased was killed and placed by the road side.

He continued to state

**“We did the necessary requirement whereby we followed the blood stain of the deceased to the homestead of one Moses Karani Waigwa [...where] we also retrieved a belt, a sandal (sic) and the handkerchief of the deceased from the toilet. The said items were identified by the father of the deceased person who said [...they] were worn by the deceased when he was leaving home on previous day before he was murdered. Later, the accused persons were brought by the public and booked at Kiganjo police station. I took over the accused persons.....and charged them for the offence of murder contrary to section 203 as read with 204 of the Penal Code”.**

IP Amwatok told the court that one Jackson Karani was arrested within the police station in a blood stained shirt, that 5 litres of chang’aa was recovered in the house of Moses Karani, a green blood stained jacket was recovered from Moses Karani, a blood stained shirt from Douglas Kuria. He said these were taken to the government analyst for forensic investigations. He also said that Moses Kuria was arrested at Chaka.

PW6 C.I.P William Matu Githitho a brother to the deceased is the one who was rang by PW3 Peter Kinuthia on 12.8.12 at 7.40am. At the scene he observed the body was about approximately 400-500m from home of Gerald Kihagi PW2. He joined the CID officers in following the blood stains which led to the home of one Mukiria and into a foot path which led to the home of one Karani Waigwa. He noted that Karani Waigwa’s home had been swept, but there blood stains outside Karani Waigwa’s wooden house. A search was mounted for the deceased’s shoes and belt. A CID officer directed them to the toilet where on looking inside the officer saw the sandals, belt and handkerchief. These were recovered. The young men in the crowd were tasked to look for the owners of the home. One of them said he had seen the owner going towards Chaka early in the morning. A team went after him. Some other persons said they had seen Kuria the 2<sup>nd</sup> accused with Karani the 1<sup>st</sup> accused the previous day. Kuria was fetched from his home. He was in a blood stained shirt, which provoked the members of the public to beat him up.

Contrary to PW6, PW3’s testimony the 1<sup>st</sup> accused was found when,

**“A police officer asked us to call him once we found him. We were directed to a chang’aa den. I entered and called him and told him we had a function. I wanted him to buy me chang’aa. I called the police officer and they came immediately. We met the police at Brookside. He was taken to Kiganjo police station”.**

PW4 Dr.Richu Mwenda produced the mental examination reports.

PW7, Dr.Gathua Beatrice produced the post mortem report on behalf of Dr.G.W.Kariithi who conducted the post mortem, and whose whereabouts were unknown. The report PEx 7 showed that death was caused by cardio respiratory arrest from suffocation caused by dislocated cervical spine.

The deceased’s father Githitho Matu testified as PW1. He lived on the same homestead with his wife, the deceased and the deceased’s sister. On 8<sup>th</sup> August 2012 the deceased obtained loan of Kshs.27,000/- from Pan Africa Insurance Company and told him about it. That day he came home at 7.00pm. The following day 9<sup>th</sup> August 2012, he gave his mother Kshs.1000/- and told her to give him Kshs.500/- which she did. He went to the shamba, while his wife went to a funeral, leaving the deceased at home. He came back later and they had lunch with the deceased, his sister Elizabeth Nyakinyua. He suggested to the deceased to give the money to his mother to keep for him. After lunch the two left for funeral as he left he reminded the deceased to give the money to his mother for safe keeping. He remained at the funeral till 8.00pm when he left for home and went to sleep.

On 10<sup>th</sup> August 2012 morning, Kariuki was not in his house. That night he never came home. On 11<sup>th</sup> August 2012 he was not seen at home at all until 12<sup>th</sup> August 2012 when his nephew Dickson Githaiga came home crying, took him in the car and drove to some place where he stopped the car and showed him where the body of his son was.

This is all the evidence that was placed before this court and upon which the court is expected to determine whether or not the prosecution has established a prima facie case to warrant the accused persons being put on the defence. **It was alleged that the two accused persons jointly with others not before court did on the 12<sup>th</sup> August 2012, murder Robert Kariuki Githithi at Gichira village.**

The prosecution was expected to establish that;

- 1 The deceased was murdered
2. By the accused persons
3. Jointly with others not before court
4. Murder being defined as the unlawful killing (actus reus) of another with malice aforethought (mens rea)
5. Malice aforethought being defined as the intention to kill

A prima facie case has been defined in the case of **Bhatt -Vs-Republic [1957] 332** to be one where a reasonable tribunal applying its mind on the evidence and the law would convict if the accused person chose to remain silent. The burden to establish this is always on the prosecution as the presumption of innocence prevails until the pronouncement of guilt by the court.

In this case the question is whether the prosecution has established any of the above.

It is not in doubt that the deceased was found dead on the road side on the 12<sup>th</sup> August 2012. The question is, is there any evidence that –

- i. The accused had any intention to kill the deceased?
- ii. The accused killed the deceased?

#### Death of the deceased

The postmortem report indicated that the time of death was on the nights of 11<sup>th</sup> and 12<sup>th</sup> at an unknown time. It was suspected that he was hit with a blunt object on the head.

The charge sheet is specific that the accused persons murdered the deceased on the 12<sup>th</sup> August 2012.

The prosecution's case is that the deceased was killed elsewhere then placed on the road side. No evidence was placed before court as to the whereabouts for the deceased on the nights of 11<sup>th</sup> and 12<sup>th</sup> 2012 of the 12<sup>th</sup> august 2012.

The prosecution attempted through the evidence of PW 6 and PC Orwa's statement to place the deceased in the home of the 1<sup>st</sup> accused person by the evidence that there were blood stains leading from where the body lay to the home of the 1<sup>st</sup> accused. There is no evidence that there was any blood trail. No blood samples were taken anywhere along the road, on the path, and in the homestead said to be of the 1<sup>st</sup> accused where PW6 alleged the deceased was killed and compared with the deceased's blood to ascertain that indeed that was his blood. The scenes of crime personnel did not visit these crucial scenes.

In addition, PW6 pointed out in his testimony that the blood stains “*passed through the home of Mr. Mukoma*” before reaching the home of the 1<sup>st</sup> accused. There is no evidence that this Mr. Mukoma or members of the family were interrogated as to whether they heard or witnessed anything on the night of 11/12<sup>th</sup> August 2012. In fact, the statement of the Investigating Officer is silent on that. This was another lead that was left hanging. Why?

It was also alleged that the sandals and belt that the deceased was wearing the day before he was murdered were retrieved from the toilet of the 1<sup>st</sup> accused. It was in PC Orwa’s statement that this was what PW1 the deceased’s father told him. This was very important as the father was among the last persons to see him on 9<sup>th</sup>. However, no such evidence came from PW1. Secondly the last time PW1 saw the deceased was on 9<sup>th</sup> August 2012 as he was leaving for a funeral. He never saw the deceased on 10<sup>th</sup> August 2012, on 11<sup>th</sup> August 2012 until he was found dead on the road side on 12<sup>th</sup> August 2012. PW6’s testimony that those were sandals and belt his brother used to wear could well be true but there is no certainty that they were the specific ones as nothing identified them as peculiar to the deceased.

The prosecution did also not account for the movements of the deceased from the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> August. This was a very serious gap in the investigations as it could have led to clues as to what had happened to the deceased. Deceased was not just an ordinary person. He was a police officer. His whereabouts in those three days could have held real leads to how he met his death. There was no explanation why that was not followed up.

It is also important that an inventory was produced to certify that the items were recovered in that homestead, in that toilet and by whom. It is a fact that when the police went to the homestead, they found no one there. No nexus was established between the said items and the accused persons.

Hence the prosecution failed to place the deceased in the home of the 1<sup>st</sup> accused.

#### The accused persons and others before court

The two accused persons were not found in the home and there was no evidence that they were in the home the previous night. In fact there is no evidence that the police entered the houses in the homestead in their investigations. 1<sup>st</sup> accused was arrested in a chang’aa den, 2<sup>nd</sup> accused from his home. No evidence was placed before the court to place them together at any place where the deceased was at the time he was killed. No others were mentioned.

Each of the accused persons was alleged to have been arrested while in blood stained clothes. No forensic evidence was placed before court to show that these stains were actually blood which connected them to the deceased. In fact the only reason for the 2<sup>nd</sup> accused’s arrest was that he had been seen with the 1<sup>st</sup> accused the night before the body of the deceased was found. No one said where they were, what they were doing or why their being seen together made them suspects in the death of the deceased.

#### Malice aforethought

What would be the motive for either or both the accused persons to kill the Robert Kariuki Gathithi? His father said he had money. No evidence was placed before court that he had that money on him and that motivated the accused persons to kill him to take it. Nor was there any evidence that either the 1<sup>st</sup> or the 2<sup>nd</sup> accused or both had expressed any intention to kill the deceased. No evidence that either of them had any relationship with the deceased of any kind to give a basis for the murder. In fact the deceased’s big brother PW6 testified of a very good relationship between his family and that of the 1<sup>st</sup> accused.

PW6 suggested that the 1st accused behaved suspiciously as was running away when he was caught by members of the public. PW3 clearly stated he found him in a chang’aa den, and escorted him to Brookside area where they met up with the police. The 2<sup>nd</sup> accused was arrested from his home. No suspicious behavior.

There cannot be a murder without mens rea. It ceases to be murder.

### The actual killing

No witness testified that they saw the accused commit the offence.

The 1<sup>st</sup> accused was arrested from a chang'aa den, the 2<sup>nd</sup> accused was arrested from his home. Nothing suspect was found on them. Not even the murder weapon was searched for.

The prosecution could argue that there was circumstantial evidence

In **R vs Kipkering arap Kipkoske and Anor (1949) EACA**, the court set the standard for circumstantial evidence. It must be such that no other inference could be drawn except the guilt of the accused. The evidence in this case falls short of that standard considering the numerous gaps in the case for the prosecution.

At a time when our media is awash with news of murders, it only behooves the investigative authorities and the prosecution to up their standards and only bring to court cases with evidence sufficient on the face of it to sustain a conviction. This is one of those cases where the prosecution just threw the court evidence that was not properly considered by the prosecuting authority.

Hence as much as a life was lost, and the victims are pained by that, the prosecution has failed to establish a prima facie case against either or both the accused persons before me to warrant their being placed on their defence.

Section 306(1) of the Criminal Procedure Code provides:

**When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.**

I therefor enter a finding of not guilty as per s. 306(1) CPC a with respect to each of the accused persons for the offence of murder c/s 203 as read with s. 204 of the Penal Code.

Each is at liberty unless otherwise legally held.

**Dated, delivered and signed in open court at Nyeri this 28<sup>th</sup> September 2018.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Ms Gicheha for state

Accused persons

Albert-Court Assistant