



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL CASE NO. 8 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

BENSON GICHANE MAINA.....ACCUSED

JUDGMENT

1. In the early hours of 5th March 2013, the lifeless body of *Philip Gachie Kahari* was found on a footpath. The scene was about 300 metres from his residence. The left side of his head was smashed; and, there was a telling pool of blood around it.
2. The accused and the deceased were schoolmates or friends. The wife of the deceased, PW1, was positive that on the material night, she saw the accused outside her house.
3. A few minutes earlier, a person who identified himself as *Chege* said the deceased was lying on a footpath. He asked her to give him assistance to bring the deceased home. When she opened her door, she saw a person “*brandishing an object*”. She quickly locked the door. She said that the stranger banged hard on the *mabati* walls.
4. The Republic brought *information* to the High Court charging the accused with *murder* contrary to section 203 as read with section 204 of the *Penal Code*.
5. The particulars are that on 4th March 2013 at *Gakira* market, Kangema within Murang'a County he murdered *Philip Gachie Kahari*.
6. He pleaded *not guilty*. The prosecution called *five* witnesses.
7. PW1 was Jacinta Wangui Charagu. She is the widow. She last spoke to the deceased on 4th March 2013 at about 7:00 p.m. The deceased was outside their house. He told her that he was going to *Gakira* market. He did not disclose his mission. None of their children was at home.
8. At 11:00 p.m., she retired to bed. At about 2:00 a.m., someone outside the house called out her name, *Mama Mwangi*, twice and *Madam Gachie* once. The person identified himself as “*Chege*”. He said her husband was lying outside on the road. He wanted her to come out to assist him to bring him into the house. PW1 was hesitant but the man grew persistent.
9. She switched on the lights inside and outside the house. When she opened the door, she saw someone “about a foot away” on the verandah. He was brandishing an object in his right hand. She knew the man as “*Nyeri*”. She had seen him “*many times when he visited [her] husband's business at Gakira*”. That was in the years 2006, 2007 and 2008.
10. PW1 quickly locked the door and started screaming. “*Nyeri*” mocked her to scream all she wanted. He started banging the *mabati* walls of the house with an object. Her sister in law, *Jane Ngoiri*, called and asked what was going on. Her house was about 20 meters away. She and her husband blew a whistle. The two then came to her house. They searched outside but did not find anyone.
11. In the meantime she tried to raise her husband on his mobile phone. A stranger answered it and said that “*they had killed [her] husband and that they would come and kill [her]*”. John Irungu, a brother of the deceased, also tried to call the deceased. A stranger picked up the call and gave a similar threat.
12. Between 3:00 a.m. and 4:00 a.m., a group of neighbours arrived. The men went out to look for the deceased. Early that morning her son Clinton Mwangi arrived home. He told her that the deceased's body was found on the road and taken to the mortuary.

13. PW1 said that “Nyeri” was the person in the dock and that he was wearing the same set of spectacles she saw that night. She testified that she *told* Ngoiri, Simon Njoroge and Irungu that she saw “Nyeri” when she opened her door the very first time on the material night. She said the deceased quit alcohol 8 years earlier.
14. Under cross examination she said she had known the accused since 1996. He would occasionally come to her husband’s business premises at Gakira. PW1 used to run the business. She said the accused and the deceased would sit outside in the verandah talking and “appeared to be friends”.
15. PW1 said that whenever she saw the accused at the shop, he was wearing eye glasses. On the material night, he was “*wearing glasses [and] a long coat reaching his legs*”. The witness could not recall the colour or any other item of clothing. But she was sure he was not wearing a hat.
16. The witness said that she visited the scene on her way to the police station. She was in the company of Simon Njoroge.
17. PW2 was Simon Njoroge. He is a brother of the deceased. He said that the deceased and the accused went to the same school. He knew the accused since 1967.
18. On 5th March 2013 at about 2.30 a.m., he heard a loud bang from the direction of the deceased’s house. He also heard a female voice calling out for help. He blew his whistle. He and his wife then went to the house of the deceased; and, organized the search party as earlier narrated by PW1.
19. They found the deceased’s body along a path. PW2’s brother, Thaihi, had reached the spot first. They decided to report the matter to Kangema Police Station. Before they got there, they saw the District Commissioner’s vehicle. The DC was with some officers. They led them to the scene. They took the body to the mortuary at Murang’a.
20. PW2 said the scene was about 300 meters from their home. The right cheek of the deceased had been “*smashed in*”. He was not aware of any grudge between the accused and the deceased.
21. PW3 was Constable Richard Mokaya. He knew the accused. On 2nd June 2013 he was instructed to arrest the accused. He and Constable Titus Wagura found the accused at Gatura Shopping Centre and arrested him. The accused was detained at Kangema Police Station.
22. PW4 was Police Superintendent Tom Achiya. He went to the scene. The body lying next to a foot path. There was a pool of blood around the head. The head appeared to have been smashed. He recognized the body as that of the Sub-County Adult Education Officer, Kangema.
23. He then went to the home of the deceased. He found PW1. She appeared to be in a state of shock. He did not talk to her at that stage. He returned to the scene. A scene of crimes officer took photographs. The body was then moved to Murang’a mortuary. No recoveries were made at the scene. A post mortem examination was later conducted.
24. He said that he and the DCIO investigated the case. He recorded most of the witness statements including that of PW1. He said the police did not trace “Nyeri” immediately. He was arrested on 2nd June 2013 by PW3.
25. Under cross examination, he said that PW1 told him that the stranger who answered deceased’s phone said: “*We are Mungiki and we have killed your husband!*” He said he received the same information from PW2.
26. He passed this information to the DCIO, Murang’a who found that at the time he calls were made to the deceased’s number the cellphone was within Kangema. That information was however not in PW4’s statement. He said that it did not lead to “*anything significant in the investigation of the murder*”.
27. Under further cross examination, he conceded that apart from the information by PW1, he “*did not get any other objective evidence connecting the accused to the murder*”. The police could also not use tracker dogs because the scene had been disturbed by the public.
28. The witness said that he was directed to the accused’s home by the area assistant chief. It was a residential plot which appeared deserted.
29. The last witness was Police Constable Jillo. He received the investigation file from PW4. He referred to a *post mortem form* dated 7th March 2013 by Dr. Mogere of Murang’a County Hospital. The pathologist was unavailable. There being no objection by the defence, PW5 produced the form (exhibit 1).
30. That marked the close of the prosecution’s case.
31. The accused was placed on his defence. I took over the matter at this stage after complying with section 200 of the **Criminal Procedure Code**. The accused elected to give sworn testimony.
32. He was emphatic that he did *not* kill the deceased. He said that he and the deceased were friends; and, they attended Mugoro Primary School between 1964 and 1972. He said he did not know the deceased’s wife. But he knew his brothers.
33. Regarding the events of the night of 4th and 5th March 2013, he testified as follows-

“On 4/3/2013 I was at home. I voted at the general election. I woke up at 6:00 a.m. I voted at Marimera and returned home at 9.00 a.m. It was a kilometre away from home. I fed cows. I left home at 5.00 p.m. and went to Gakira Market at Wairi Bar. We watched TV until 9:00 p.m. When I entered Mukuna Bar I left at 10:00 p.m. and reached home in a few minutes.

“I live with my wife and children. The next morning I woke up at 7:00 a.m. I never went out. I went to Mugoiri to see my in-laws 6 Kms away. I returned home at 5.00 p.m. I did not leave my house after going to sleep on 4/3/2018, I do not know Philip Gachie’s wife. I never used to visit him. He used to have a shop at the Centre. I do not know his home. PW 1 (the wife) said she last saw me in 1996 or 1997. I used to drive a PSV styled “Nyeri”. I am not known as “Nyeri”. It ceased service in 1986.

“I was arrested on 1.6.2013. All that time I was building a Church in Kangema. I knew the deceased had been killed. On 7.3.2013 I had travelled to Nairobi to get my building tools. I returned to Kangema the same day. I did not kill the deceased. Assistant Chief Irungu Waiyego and the deceased’s brother John Irungu both refused to testify in this case. I wrote a statement to the police. My mother in law is Wairimu. She was not questioned by police. My wife and children were also not interviewed by the police.”

34. When cross-examined, he insisted that despite his friendship with the deceased, he did not know his wife. He also conceded that he did not call the persons he was drinking with as witnesses. He denied that he was drunk. But he could not remember the details of the rider or the motor-bike that he took home. He denied that he visited the home of the deceased on the material night. He said he had no grudges with PW1.

35. He also admitted that in his statement, he had said that he “travelled to Nairobi to work at Baba Dogo until 15/5/2013 although I would visit Kangema on weekends”. But he insisted that the correct version of events was the one he narrated to the court.

36. That marked the close of the defence.

37. Learned counsel for the defence filed submissions on 26th October 2018. Learned Prosecution Counsel elected not to file submissions.

38. Section 203 of the **Penal Code** provides that any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.

39. There are three key ingredients that *must* be present: first, the prosecution must prove beyond reasonable doubt the *death* of the deceased and the *cause* of that death; secondly, that the accused *committed* the unlawful act that led to the death; and, thirdly, that the accused was of *malice aforethought*.

40. *Malice aforethought* is the *mens rea* or the *intention* to kill another person. Section 206 of the **Penal Code** defines it as follows;

“206. *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.”*

41. From the *postmortem form* there is no doubt about the death. The cause of death is also *known*. It was due to a *severe head injury* to the left side of the face causing *severe hemorrhage*.

42. I entertain *no* doubt that the death was *unlawful*. The only live question now is whether the accused, of *malice aforethought*, killed the deceased.

43. There was no *eye witness* to the murder. The entire case for the prosecution hinges upon *circumstantial evidence*. In **R v Kipkering arap Koske & another** 16 EACA 135 (1949) the court held-

“*In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt*”

44. The first key question relates to *identification*. PW1 said that she switched on the lights outside her house. When she opened the door, she saw someone “*about a foot away*” on the verandah brandishing an object in his right hand. She knew the man as “Nyeri”.

45. They were not strangers: She had seen him “*many times when he visited [her] husband’s business at Gakira*”. I think the accused was

not entirely candid. He knew the deceased for many years. They would occasionally sit and chat at the shop verandah. The deceased's wife would be at the shop counter. I find that it is possible, but *highly improbable* that the accused did *not* know the wife of the deceased.

46. However, PW1 opened the door for only a *fleeting moment* and quickly shut it. She had just woken up from sleep. The key feature she noted were the *spectacles* worn by the accused. It was well after 2:30 a.m. Notwithstanding the electric light, I find that the conditions for a positive identification were less than ideal.

47. Furthermore, the person who earlier called out her name was standing outside in the dark. He said his name was *Chege*. It is not certain that it was the same person.

48. Finally, the murder took place *300 metres* away from the homestead. There was yet another stranger who answered the deceased's cellphone. This one expressly said he killed the deceased. He also issued threats to harm PW1 and John Irungu. The latter did not testify in this case.

49. PW4 Police Superintendent Tom Achiya passed this information to the DCIO, Murang'a. The latter found that at the time the calls were made to the deceased's number the cellphone was within Kangema. PW4 conceded in cross examination that it did not lead to "*anything significant in the investigation of the murder*".

50. The accused denied that his name is "Nyeri". He admitted that he used to drive a PSV styled "Nyeri" which ceased service in 1986. Here again, I got the distinct impression that he was stonewalling. From the evidence of PW1, PW2, and PW3, the accused was locally known by the moniker *Nyeri*.

51. The accused was emphatic that he never disappeared from the *locus in quo*. He said he was doing some masonry work at a church in Kangema. On 7th March 2013 he travelled to Nairobi to get some tools and returned to Kangema the same day.

52. The evidence of PW1 and PW2 is thus shaky. The other evidence was from police officers whose investigations did not break new ground. It is true that the accused was drinking at Gakira on the material night. The deceased told his wife at 7:00 p.m. on the material night that he was also going to Gakira market. But no evidence was led to suggest that the two met at Gakira; or, that the accused accompanied him on the way back.

53. I am fortified there by the complete lack of *motive* in this case. The two were friends; and, there was no mention of a grudge or conflict. Of course, the prosecution was *not* obliged to prove motive. But its *absence* casts some doubt on the *intention* of the accused. ***Nzuki v Republic***, Court of Appeal, Nairobi, Criminal Appeal 70 of 1991 [1993] eKLR.

54. The prosecution is obliged to *prove* the *mens rea* for murder: that the accused was of *malice aforethought*. See ***Nzuki v Republic*** [supra]. In a synopsis, the two key ingredients of *actus reus* and *mens rea* are missing in this case.

55. The totality of evidence raises *suspicious* against the accused. But there is no *concrete* evidence, *beyond reasonable doubt*, that the accused *perpetrated* this heinous crime.

56. The accused may have lied; or, even concealed some vital information. But our criminal justice system places the *burden of proof* entirely upon the shoulders of the prosecution. See ***R v Kipkering arap Koske & another*** 16 EACA 135 (1949), ***Woolmington v DPP*** [1935] AC 462, ***Bhatt v Republic*** [1957] E.A. 332.

57. I have reached the conclusion that the entire corpus of *circumstantial* evidence does not *irresistibly* and *exclusively* point to the guilt of the accused. See ***R v Kipkering arap Koske & another*** [supra], ***Sawe v Republic*** [2003] KLR 364. The chain of events is *incomplete*.

58. Granted the evidence, I *cannot* say with confidence that *all* the elements of the charge of *murder* have been laid out; or, at any rate that the accused, of *malice aforethought* killed the deceased.

59. I accordingly enter a finding of *not guilty*. The accused person is hereby *acquitted*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 18th day of December 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Accused.

Mr. Gichuki for the accused.

Ms. Gichuru for the Republic.

Ms. Dorcas and Ms. Elizabeth, Court Clerks.