



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL CASE (MURDER) NO. 50 OF 2015
(Formerly Nakuru HC.CR.C. No. 67 of 2013)

REPUBLIC.....PROSECUTOR

-VERSUS-

PETER NJUGUNA MACHIRA.....1ST ACCUSED

ERNEST MUCHIRI NJOROGE.....2ND ACCUSED

J U D G M E N T

1. This case was first registered in the High Court of Kenya at Nakuru where the Accused pleaded not guilty to the charge of Murder Contrary to Section 203 as read with Section 204 of the Penal Code. The Particulars stated that on 6th day of July 2013 at Weru area in Nyandarua South District within Nyandarua County, they jointly murdered **Julius Njuguna Maina**.

2. During the trial which commenced after the transfer of the case to this court, the Accused were represented by Mr. Gichuki. Mr. Waigwa Ngunjiri appeared on behalf of the victim's family. The prosecution called eight witnesses.

3. The prosecution case was as follows. The deceased was a first cousin of the 1st Accused and the two families lived close together at Weru, village, Kinangop. The deceased was a casual labourer who sometimes worked alongside the 1st Accused.

4. On 6/7/2013 the deceased left home for the local trading centre – Weru. Early on the next morning a sister of the deceased one **Tabitha Wairimu Maina (PW3)** left home early on her own errands. She stumbled on the deceased lying in a foot path traversing the homestead of the 1st Accused's family. He had serious head injuries. **PW3's** screams attracted the deceased's brother **John Kangure Maina (PW2)**, father **Maina Kangure (PW4)** and other villagers. A blanket provided by the family of the 1st Accused was used to carry the deceased to the local dispensary.

5. It is the prosecution case that the deceased made a dying declaration implicating the two Accused as the assailants. Further according to **PW2** he rushed to report the matter to Administration Police Constable **Dennis Ogaro** of Weru Police Post (**PW5**) he spotted the 1st Accused who wore a jacket with what appeared to be blood stains. **PW5** arrested the said Accused and retrieved the jacket, retaining it as an exhibit.

6. The deceased died on arrival at the Naivasha District Hospital where he had been referred. Later on the

same date, police officers from Kinangop Police Station on receiving the report, visited the scene, collected sticks suspected to be murder weapons and searched the homes of the Accused persons. From the house of the 1st Accused, a blood stained trouser was found concealed under a mattress. A wet shirt was recovered hanging inside the 2nd Accused's house. Blood samples of the suspects and of the deceased were taken, the latter during the post mortem examination.

7. According to the post mortem report the deceased succumbed to severe head injuries sustained from blunt force trauma. An analysis of the blood samples with the clothings and sticks recovered at the scene of murder was conducted by **Lawrence Muthuri Kinyua (PW7)** the Government analyst. Results showed that the DNA profile generated from the deceased's blood sample, one of the sticks, the 1st Accused's jacket and trouser were matching.

8. Both Accused persons made unsworn defence statements. The 1st Accused said that he was known to the deceased, being a cousin and was a resident of Weru. That on 7/7/2013 one **Mwangi Kangure** approaching him for a blanket and explained that the deceased had been injured. He accompanied him to the scene while wearing his jacket and assisted to ferry the deceased, presumably to hospital. Because it was a wet day, he fell into a water puddle forcing him to go home and change his trouser.

9. He kept the stained trouser under a seat before rejoining the team assisting the deceased at the dispensary. With others, he waited outside the clinic. He then saw **PW2** in the company of a police officer advance towards him. He was arrested. He was not questioned.

10. The 2nd Accused said he was a farmer at Weru. That 7/7/2013 while going about his personal errands he was intercepted by police and forced back to his home. He opened his home for the police to conduct a search. They took a shirt which was drying inside the house. He was arrested.

11. There is no dispute that both Accused and deceased were all people from the same village and knew each other. And further, that on the morning of 7/7/2013 the deceased was found lying on a footpath with several head injuries. That a blanket given to his family by the 1st Accused was used to carry the victim to the local dispensary. Further it is not disputed that the 1st Accused was arrested while wearing the jacket produced herein as **Exhibit 3** and that a trouser **Exhibit 4** was also recovered from his house later on the same date. The cause death of the deceased is not in dispute.

12. The court must determine whether, the Accused persons jointly and of malice aforethought inflicted upon the deceased the injuries resulting in his death. The prosecution evidence against both Accused persons is primarily circumstantial.

13. The principles applicable in considering whether circumstantial evidence meets the required threshold were set out in **Republic -Vs- Kipkering Arap Koskei [1949] 16EACA 135** where the court stated that:

“.....In order to justify on circumstantial evidence the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and in capable of explanation upon any other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecution and never shifts to the accused.”

And in **Simon Musoke -Vs- Uganda (1958) EA 715** where the court citing the decision in **Teper -Vs- Republic [1952] 2 ALLER 447** stated that:

“It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no co-existing circumstances which could weaken or destroy the inference.”

14. To start with, the 2nd Accused was arrested on the basis of suspicion of involvement in the offence, and the discovery in his house, of a freshly washed shirt which appeared to be blood stained. No traces of

blood however, were detected in the shirt when subjected to DNA analysis. No witness gave evidence to connect the 2nd Accused with the murder of the deceased, even though it would be reasonable to conclude that he was assaulted by more than one person judging from the sticks found at the scene. For these reasons I must acquit the 2nd Accused at this stage under Section 322 of the Criminal Procedure Code.

15. Regarding the 1st Accused however three pieces of evidence tended to implicate him in the murder of the deceased. The most significant was the recovery of the blood stained trouser **Exhibit 4** from his home after the arrest. On arrest he was admittedly wearing the jacket **Exhibit 3** which was retrieved from him by **PW5**. The second piece of evidence was the fact that the deceased lay in a local footpath within the homestead of the family of the 1st Accused and finally, there was the dying declaration allegedly made to **PW2** by the deceased before he died.

16. Regarding the location where the deceased was found in a critical state early on the morning of 7/7/2013, there was no dispute that the same was within the compound or farm of the family of the 1st Accused. Indeed the blanket used to remove and carry the deceased to the local dispensary was obtained from the home of the 1st Accused. It seems that the 1st Accused's family had allowed villagers to use the path on their farm, thus the location was not a secluded place as such.

17. However the prosecution relied strongly on the evidence, that the jacket he wore bore blood stains which matched with the deceased's blood. According to **PW5**, when **PW2** made a report to him he accompanied him to the scene. He said:-

“..... on way to scene met a group of people carrying victim. We accompanied them to Weru Dispensary for first aid. We stood outside (dispensary). Then Ngure (PW1) came and said one of the people there had bloody clothes. He had blood on his jacket and did not answer my questions. I placed him in cell and kept jacket. Ngure then came and said Peter Njuguna (1st Accused) and Muchiri named by victim.Deceased was being carried to hospital by a group of people. His entire body had injuries.”

18. In cross-examination **PW5** said he did not know if the 1st Accused was one of those who assisted carry the deceased to the dispensary. **PW2** and his father **PW4** also denied that the 1st Accused assisted in carrying the deceased to the dispensary. After Kinangop Police took over investigations, **PC Gatheru (PW6)** visited the 1st Accused's house on 7/7/2013 in the afternoon. **PW6** stated that after visiting the scene they proceeded to the house of the 1st Accused where they conducted a search that yielded the trouser. **PW6** also received into his custody the jacket earlier recovered by **PW5**. He said that the trouser recovered at the 1st Accused's home was found after a thorough search.

19. PC Lekadar (PW7) who accompanied **PW6** during the search was more specific. He testified that the stained trouser (**Exhibit 4**) was found stashed under a mattress in the 1st Accused's house. The 1st Accused in his defence did not deny that his jacket and trouser were blood stained, and that while he wore the former at recovery, the latter was found in his house.

20. Although he did not expressly say so, his defence appears to be that his clothes somehow got smeared with the deceased's blood while he helped carry him to hospital. The likelihood that this happened is negated by evidence by **PW2** and **PW4** to the effect that all the 1st Accused did was assist with a blanket and not handle or carry the deceased. Secondly, in order to end up with both his jacket and trouser stained with the deceased's blood, the 1st Accused would have had to be in more contact with the deceased than carrying him with four others on the makeshift stretcher made out of the blanket. The 1st Accused did not state the exact the circumstances in which both his jacket and trouser got stained with the deceased's blood.

21. The fact, indirectly admitted by the 1st Accused that the trouser was concealed under a mattress or seat in the 1st Accused's house is telling. There is no evidence that there was pre-existing ill will

between the 1st Accused and the deceased's family. PW2 and his father PW4 on finding the wounded deceased went directly to the 1st Accused's home to borrow a blanket.

22. Alleged family squabbles, arising from the deceased's mother's alleged support for the 1st Accused's father's intention, to take a second wife in addition to the 1st Accused's mother, appear to me too remote to support the theory that the 1st Accused was falsely implicated. Besides, the recoveries in this case were made by police officers who had no connection with the internal family politics. What is the explanation for the presence of the deceased's blood on the 1st Accused's jacket and trouser other than his involvement in the assault on the deceased and possible hauling of the body to the public path?

23. Section 111 of the Evidence Act states:-

“(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

(2) Nothing in this section shall—

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or

(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

24. While in this case, I do not consider that the dying declaration of the deceased can be relied upon in light of the apparent time and circumstances of assault, the evidence against the 1st Accused leaves no doubt regarding his guilt. The prosecution evidence displaces the 1st Accused's defence which in my view defies belief.

25. One of the sticks found at the scene of the incident tested positive with the deceased's blood, while the post mortem form indicates that the head bore 11 laceration wounds measuring 20mm by 50mm, and resulting in extensive sub scalp haematoma and raised intracranial pressure. His upper limbs and chest wall also had injuries.

26. Death was caused by the head injuries inflicted through blunt trauma, consistent with several blows with sticks, such as the one found stained with the deceased's blood. The multiplicity of the injuries to the head clearly demonstrates an intention by the assailant or assailants to cause grievous harm, if not death to the deceased. The motive may never be known but motive is not a necessary ingredient to the offence of murder – See **Libambula -Vs- Republic (2003) KLR 683.**

27. In light of all the foregoing, I am satisfied that the prosecution has proved the 1st Accused's guilt

beyond any reasonable doubt. I find him guilty and convict him accordingly. As for the 2nd Accused, as earlier stated, he is acquitted and set at liberty unless otherwise lawfully held.

Delivered and signed in Naivasha this **28th** day of **June, 2017**.

In the presence of:-

Mr. Mutinda for the DPP

Mr. Gichuki for the Accused

Accused 1 – present

2 – present

C/C – Barasa

C. MEOLI

JUDGE