



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO 2 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

DAVID KAGWI GAKAHU.....ACCUSED

R U L I N G

1. The Accused in this case, **David Kagwi Gakahu**, is charged with *murder* contrary to **section 203 as read with section 204** of the *Penal Code*. It is alleged in the information dated 19th April 2013 that in the night of 17th/18th April 2013 at Karuru Sub-location within Murang'a County he murdered one **Samuel Mbigi Mwangi** (hereinafter called the *Deceased*). On 31/05/2013 he pleaded not guilty to the charge.

2. The Accused's trial commenced before Ngaah, J on 28/05/2014. The judge took the evidence of PW1, PW2 and PW3 before he was transferred to another station. On 17/06/2015 the trial continued before me under **section 200(3)** of the *Criminal Procedure Code* (the *Code*). I took the evidence of PW4, PW5, PW6 and PW7. The prosecution then closed its case.

3. Learned Prosecution Counsel did not wish to make any submissions under **section 306(1)** of the Code, except to state that she relied on the evidence on record, and that the same established a *prima facie* case against the Accused.

4. Learned counsel for the Accused on the other hand submitted at some length, to the effect that the circumstantial evidence placed before the court came nowhere near establishing any connection between the Accused and the Deceased's death, and that that evidence amounted merely to suspicion.

5. Section 306(1) of the Code reads –

“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 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.”

In criminal trials in the High Court therefore the prosecution must establish against an accused, not merely a *prima facie* case, but a much stronger case to require him to be placed on his defence under subsection (2) of this section.

6. In the present case what evidence was placed before the court? The prosecution called 7 witnesses. PW1 (**Ruth Wanjiku Gakahu**) was the Accused's mother. She testified that on 18/04/2013 at about 6

a.m. she woke up and went to the Accused's house about 20 metres from her own house to look for a jembe. She found him at the door of his house holding a nylon paper bag. He did not answer when she asked him to give her a jembe. Instead he closed his door and walked away. As she followed him she noticed somebody who appeared to be sleeping close to the Accused's house. At first she thought it was a drunk person, but when she touched him she noticed he was dead. She knew that person as Sammy (the Deceased). She asked the Accused about the Deceased but he never answered. She then went and called neighbours. When the Accused saw them he ran away.

7. In cross-examination PW1 stated that in her compound there were three houses and that six people lived in the compound. The compound was about 30 metres from a public road. She had not heard any commotion the night before. The Deceased was about six metres from the Accused's house. She never saw the Accused touch the Deceased; nor did she hear anybody claim that the Accused had beaten the Deceased.

8. PW2 (**John Wachira Mwangi**) was the Chief of the area (Gatundu Location). His testimony was that on 18/04/2013 at about 7 a.m. he received telephone calls from three different people to the effect that there was a body found outside the Accused's house. He knew the Accused. He proceeded to the scene and found the Chief of neighbouring Mugoiri Location and members of the public who reported that they had seen the Accused going away. He observed the Deceased's body. It had injuries on the head. PW2 and others then started looking for the Accused. They saw him going to Mjini. They traced him to Mjini Primary School and followed him to a toilet; there they arrested him. He had a green paper bag with him that had some clothes and rolls of bhang. They then took the Accused to **Kahuro Police Station**.

9. PW3 (**Jane Nyambura**) worked at a bar at Kahuro. On the evening of 17/04/2013 she had served the Accused beer until about 10 p.m. when he left. At about the same time the Deceased had come in and left about half an hour later after taking one drink. The Deceased and the Accused never talked to each other, and they had left at different times. There were other patrons in the bar.

10. PW4 (**Mathew Miah Mwangi**) was the Chief of Mugoiri Location. Just like PW2 he was alerted by phone about the Deceased's body by a member of the public. He visited the scene and noted that it was in the neighbouring location, Gatundu. He and PW2, along with others, eventually arrested the Accused. In cross-examination he stated that he had observed the scene where the Deceased's body was found. It appeared that the body had been dragged about. From his own observation he could not overrule the possibility of the Deceased having been killed elsewhere and the body dumped there.

11. PW5 (**Stephen Irungu Mwangi**) was a brother of the Deceased. He identified the body of the Deceased to the doctor who performed the *postmortem* examination.

12. PW6 (**Dr. Kimende George Kairu**) had previously worked with one **Dr. Wairegi** who conducted the *postmortem* examination of the body of the Deceased, and was familiar with his handwriting and signature. He produced in evidence the *postmortem* report (**Exhibit P3**) prepared and signed by Dr. Wairegi.

13. The Deceased's body was that of a middle-aged, well-built and well-nourished male. The external appearance of the body showed a **haematoma** on the temporal area of the scalp. A **depressed fracture** of the temporal bone was evident. There was clotted blood in the nostrils and the left ear.

14. A closer examination of the head disclosed a **depressed fracture** on the left temporal bone with a wide **fracture line** extending to the right temporal parietal region. Brain tissue at the fracture site was severed and there had been massive **intra-cranial haemorrhage**.

15. Dr. Wairegi formed the opinion, as a result of his examination, that the Deceased died of **cardio-pulmonary arrest due to intra-cranial hemorrhage following head trauma by a blunt object**.

16. The last witness called by the prosecution was the investigating officer, **Corporal Stephen Mboroki** (PW7). He and other police officers visited the scene where the Deceased's body had been found. He

observed that there was no blood at the scene. Later the Accused (who had already been arrested) was handed over to him. He subsequently caused him to be charged with the murder of the Deceased. He also took into his possession various items that had been recovered as exhibits. He produced them in evidence.

17. In cross-examination PW7 stated that he did not cause any of the exhibits recovered near the Deceased's body to be dusted for finger prints because they had been rained upon the previous night.

18. That was the totality of the evidence placed before the court by the prosecution. This evidence shows that the Accused was charged with the murder of the Deceased for two main reasons –

- (i) The Deceased's body was found just outside his house.
- (ii) His conduct in relation to the Deceased's body was suspect.

19. That the Deceased was murdered cannot be in doubt, given the massive head injury he had received and which had caused his death. But who murdered him?

20. Though the Deceased's body was found near the Accused's house, this house was within a compound that had other houses, and in which, according to the testimony of PW1 and others, at least 5 other people lived. The compound was also next to a public road. There was also the testimony of PW4 to the effect that it appeared that the Deceased's body had been dragged about, and that he could not exclude the possibility that the Deceased had been killed elsewhere and his body dumped where it was found.

21. The conduct of the Accused in relation to the Deceased's body was suspicious, as testified by his own mother (PW1) and the two chiefs (PW2 and PW4) who assisted to arrest him. But suspicion, no matter how strong, is not evidence, unless it is part of a chain of circumstantial evidence that irresistibly points to the guilt of an accused person. In the present case there was not any more than suspicion, particularly when you consider that the Accused was found in what appeared to be illegal possession of a large quantity of *cannabis sativa*. That fact by itself could have constituted sufficient reason for him to want to escape.

22. Having reviewed the prosecution case as presented to court, I consider that there is no evidence that the Accused committed the offence charged. I therefore record a finding of not guilty under section 306(1) of the Criminal Procedure Code. I hereby acquit the Accused. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF FEBRUARY 2016

H.P.G. WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 26TH DAY OF FEBRUARY 2016