



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 52 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

THOMAS MAMAI.....ACCUSED

JUDGMENT

Thomas Barasa Mamai was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the night of 3rd and 4th day of September, 2010 at Huruma Estate within Eldoret town in Uasin Gishu District jointly with others not before court murdered Samuel Mungai Njoroge.

THE EVIDENCE

The prosecution's case is that both the accused and the deceased lived within Huruma Estate in Eldoret Town. The estate is adjacent to Sungura and King'ong'o villages. The deceased was a man who was not quite mentally stable. He was widely known within the area as a jovial and social man. On the fateful night of 3rd September, 2010 he was lured into the house of the accused where he was invited to drink changáa. The deceased loved changáa and would go visiting several homes due to his mental impairment. On the following morning his mutilated body was found in a ditch besides a road that was near the accused's house.

According to the investigating officer who testified as **PW7, Corporal Samson Owaga** of CID Eldoret, the accused had been tasked by a witch doctor by the name Omoding from Malaba to look for two legs and the right middle finger of an imbecile person. That is how the accused identified the deceased as the right person to get the body parts from owing to his mental inability. Indeed, when the body was recovered on 4th September, 2010 both the lower limbs and the right middle finger were missing. It was suggestive of a ritual killing. There were blood stains from where the body had been dumped leading to the house of the accused person. Inside the accused person's house blood was splashed all over and a big pool of it was beneath a PVC carpet on the floor. A table cloth that covered the table was also dotted with a lot of blood. There were also several blood stains on a grass lawn outside the accused's house. PW7 collected some blood sample using a cotton swab from the pool of blood underneath the PVC carpet. The table cloth was also taken as an exhibit. After the accused was arrested on the following day, the investigating officer noticed that the trouser and the left shoe he was wearing had blood stains. He took them for analysis at the government chemists. During the postmortem exercise a blood sample of the deceased was taken and was forwarded to the government chemist for DNA Analysis.

The DNA analysis revealed that the blood on the trouser, the shoe and the cotton wool swab belonged to the deceased.

Although the accused on interrogation distanced himself from the offence, investigations revealed that he is the person who committed the heinous act. He had informed the investigating officer that on the night of 3rd September, 2010 he had been visited by three men who had been sent by the witch doctor Omoding to come to Eldoret and look for two legs and the right middle finger of an imbecile for his rituals. PW7 testified that the accused gave him the names of the suspects as, Namasaja, Geoff (Geoffrey) and Kim. In return, the medicine man was to pay sum of Kshs. 500,000/-. The accused went to the shop to buy alcohol for his visitors. He also had in mind the name of the deceased as a good culprit since he was an imbecile and lived in the same area with him. As he returned home from buying changáa he met the deceased who he invited to his house to drink changáa. That was about 3.00 p.m.. At about 7.00 p.m. the changáa run out and the accused went to buy more. The entire group took changáa until 8.30p.m when the accused excused himself to go and pay rent to his landlord who lived nearby. He found the landlord and his wife with whom he chatted until 10.00 p.m. When he returned to his house he found that his visitors had already killed the deceased. They had placed his torso behind the door. The two legs together with the right middle finger were in a polythene bag on the table. He asked his visitors why they had killed the deceased, and they informed him that they had accomplished their mission. The accused was tired and he rested in bed. At about 4.00 a.m. on 4th September, 2010 the visitors put the body in a bag and dumped it outside near his house. They then took the body parts and left for Malaba by matatu.

PW7 testified that on the 5th of September, 2010, he took the accused while accompanied by two other police officers in a police Land Rover to Malaba in an attempt to arrest the three men who had been mentioned by the accused. On arrival at Malaba, the police were only able to trace Namasaja and Goff who the accused identified. They arrested them and brought them to Eldoret for interrogation. On thorough interrogations PW7 realized that they had been framed by the accused and they hardly knew Eldoret. He therefore released them.

Incidentally, on arrival at an area called Maili Nne, while PW7, the other police officers and the accused were travelling to Malaba, noticed a black Harrier car trailing them. That is when the accused told PW7 that the person in that car was the witch doctor Omoding and that the body parts of the deceased were in that car. The police kept alert but noticed that the driver of the harrier car had realized that they had noticed the car was trailing them. It over took the police Land Rover at a very high speed. The Land Rover was unable to keep the pace of the car. On arrival at Malaba PW7 and his colleagues reported to the CID stationed there. After giving a background of their purpose in Malaba, one of the officers at Malaba informed them that Omoding had just crossed the border into Uganda. They were shown the black Harrier car that was pacing about one kilometer into Uganda. Due to protocol PW7 was unable to follow the car. Be that as it may PW7 having found no fault against the three men who had been adversely mentioned by the accused, and there being no evidence that Omoding had been given the body parts, concluded and was convinced that it is the accused who solely killed the deceased. He accordingly charged him.

PW1, James Ngomi was an uncle to the deceased, the deceased being a son to his sister. He received the news of the death of his nephew on 4th September, 2010 about 9a.m. from one Waweru who was a brother to the deceased. The information was that the deceased had been killed in Sungura area which was neighbouring Huruma. He visited the scene together with other relatives. They found that the body had been dumped in a ditch by the road side using a sack. It had no legs and one right finger. It also had a wound at the back of the neck. Waweru had already reported the incident to police at Baharini Police Post who in turn called CID officers from Eldoret Central Police Station. PW7 was tasked to investigate the case. On the 6th of September, 2010 PW1 went to Moi Teaching & Referral Hospital where he identified the postmortem of the body of the deceased person being conducted.

PW2, Joseph Waweru Njoroge was a brother to the deceased. His testimony was that on 4th September, 2010 a neighbor one Peter Githuma visited his house and informed him that his brother Mungai had been killed and his body was found at Sungura area. He visited the scene and witnessed that indeed his brother's body had been mutilated as it had no legs and one finger. He testified that he lived with his deceased brother at Kingóngó area. He was aged 38 at the time of his death. He confirmed that the deceased was not mentally stable since the year 1992. He therefore took care of him entirely. He also

testified that he had last seen him on 2nd September, 2010 and he never returned home again. Prior to the year 2009, the deceased lived alone in Huruma although he took all his meals in PW2's house. PW2 further testified that the accused was arrested by a village elder one Mr. Ngángá.

In cross-examination, PW2 stated that the deceased was not a drunkard although he used to drink alcohol, anyway. He stated that the deceased was not married. He also stated that he did not know the accused until the time he was identified to him by the village elder.

PW3, Ngángá Njuguna was the Huruma Estate Village Elder. He testified that on 4th September, 2010 he heard noises from the compound of his brother Johana Kuria (deceased) with whom he lived on the same plot but different compounds. Johana's home was across the road. He went to where the noise was coming from and found a crowd of people gathered at a swamp. There was a white sack tied at the top. When people opened the sack they found a body of a man which had no legs and one finger. It also had some cut wounds. He identified the body as that of the deceased who lived with his brother in Kingóngó. He also knew that the deceased had a mental illness. As he was returning to his home he saw a trail of blood stains which led him to the gate of the compound owned by his late brother Kuria. The compound had five single rental houses. On opening the gate the trail of blood led him to the first door. He physically knew the occupant of that house although he could not recall his name. He was familiar with the occupant who used to fetch water from a borehole in his compound. He then called police officers from Central Police Station to whom he indicated that he knew the occupant of the house as a hawker. He was allocated two police officers who accompanied him to Langas Bus Stage in Eldoret Town. There they found the accused hawking his merchandise which included groundnuts. He was arrested and taken to the police station. It is at the police station that PW7 noticed some blood stains on the trouser and a shoe he was wearing which he took possession of.

PW3 further testified that the police requested the accused for the keys to his house which he gave them. PW3 accompanied the police officers to the accused's house. They opened the door with the keys. That is when they saw blood splashed all over the house. A carpet and some slippers on the floor were totally soaked in blood. A window curtain also had blood stains as well as a table cloth that covered the table inside the house. The deceased's sweater that was outside the accused's house was also soaked in blood. On raising the carpet, they saw a small hole dug on the floor that was full of blood. Police collected some samples of it on a cotton swab. PW3 and his deceased brother Kuria recorded statements accordingly.

In cross examination, PW3 stated that Sungura, Kingongo and Huruma estates were in one location. He stated that the deceased was found in Sungura area. He confirmed that the accused lived in the first house in the plot that belonged to his brother. He confirmed that he was present when the police carried away his trouser and shoe. He also confirmed that the two missing legs and a finger of the deceased were never found.

PW4, Sargent Fredrick Simiyu Sirengo then working with CID Eldoret, confirmed that on request of the investigating officer he visited the scene and took necessary photographs. He confirmed that the deceased's body did not have both legs from the knee joint. It also had a deep cut at the back of the neck caused by a sharp object. The right wrist also had a sharp cut. PW4 also visited Sungura Village where he met the investigating officer Corporal Owaga who identified to him the house of the deceased. He took a photograph of the scene which he confirmed was covered with blood stains. The photographs of the body of the deceased were taken at Moi Teaching & Referral Mortuary in the presence of Corporal Owaga and Corporal Namanga of Baharani Police Post. He produced all the photographs as evidence.

PW5, Doctor Richard Chumba of Moi Teaching and Referral Hospital conducted the postmortem on the body of the deceased. He observed that it had deep cuts on the occipital region through the vertebra and spinal cord (trans-section of the cord) measuring 13x8cm. It had been amputated both lower limbs at the level of the knee joint with a sharp object. It had amputated right ring finger of 1.5x4cm in measurement. In addition, he took the images of the injuries. He concluded that the deceased died of multiple cut wounds transecting the spinal code. He signed the postmortem report on 9th September, 2010 and produced it as an exhibit.

In cross examination, PW4 stated that it was difficult to tell whether the amputation had been done by one person.

PW6, Henry Kiptoo Sang testified as a government analyst. His testimony was that on the 13th of October, 2010 the government chemist received a black trouser, one black shoe, one table cloth with orange flowers, a cotton wool swab, blood sample in a bottle of the accused and blood sample in a bottle of the deceased. They were presented by a police officer from Eldoret Police station accompanied by Police Memo Form. The request was to do an analysis of the blood samples and any comparisons with a view to establishing the source. On doing the analysis, he found out that the trouser, table cloth and cotton wool swab were slightly stained with human blood. Although the shoe was also stained with human blood he was not able to generate any DNA profile from it as the blood on it had decomposed. The DNA profiles he generated were from other items presented. He concluded that that the DNA of the blood from the table cloth and the cotton wool swab matched those of Samuel Mungai, the deceased's herein. He prepared and signed the Analyst Form on 28th July, 2015 which he produced as an exhibit.

In cross examination, he stated that he had 14 years of experience as a government analyst. He was quick to clarify that blood samples and other exhibits meant for analysis can be preserved up to a period of even 20 years as long as they are well kept. In the present case, the exhibits were securely preserved in the government chemist stores which are well ventilated. As such although he prepared his report on 28th July, 2015 he was able to analyse the DNA profiles.

PW7 summed up the evidence of the prosecution's case which marked the introduction of the summary of the prosecution's case above. In addition, he testified that he did not see the need to question the witch doctor Omoding as, while interrogating the accused, he never told him that the body parts were given to Omoding. On the 9th of September, 2010 he escorted the accused to Eldoret District Hospital for age and mental assessment and he was found fit to stand the trial. He testified that both the blood samples of the deceased and accused were obtained at Moi Teaching and Referral Hospital.

In cross examination, he confirmed that the accused who was a hawker was arrested at Eldoret bus stage while hawking his wares. He confirmed that he personally took possession of the trouser and the shoe that were subjected to DNA analysis from the accused while he was in the cells. He also confirmed that it is the accused who personally gave him the keys to his house, which house was identified by the village elder. He stated that he could have taken the accused back to his house because members of the public were baying for his blood and wanted to lynch him. He denied that he failed to pursue Omoding because he feared he would bewitch him. Instead, he stated that he had no evidence against him. He further stated that while he was at Malaba he gathered information that the accused used to work for Omoding in Malaba in his witchcraft work whenever he wanted any paraphernalia before he relocated to Eldoret. He stated that he never met Omoding. He also confirmed that the police land rover stalled several times on their way to Malaba but was quick to state that the hitches were caused by mechanical problems and not the powers of Omoding. He also denied that although some witnesses died before they testified they were killed by the powers of Omoding. He confirmed that one of them died because of liver cancer.

After the close of the prosecution's case the court ruled that the accused had a case to answer. He chose to give an unsworn statement of defence. His defence was an alibi. He stated that on the morning of 3rd September, 2010, he went to the Moi Teaching and Referral Hospital to check on his friend who was sick. On arrival, he found that his friend had been admitted as an in-patient. He had no one to look after him. The accused thus decided to spend the night in the ward with his friend. On the following morning, he did not go to his house but proceeded to his business. He stated that he and other hawkers used to keep their wares in a store they had rented in the town. While in the course of his duties he was arrested by a police officer and escorted to Eldoret Central Police Station where he was locked up. At 3.00 p.m. he was informed that he had killed the deceased. He denied he knew the deceased or killed him. He also denied that he gave the investigating officer the keys to his house. He could not therefore confirm whether any murder took place in his house. In addition, he denied that he confided in the investigating officer that he had hosted three visitors from Malaba who killed the deceased in his house. He further denied that the trouser and the shoes that were subjected to DNA analysis belonged to him. He however stated that he

knew the witch doctor Omoding who was known for cursing wrong doers and made them to eat grass but denied that he has ever worked for him or helped him get human body parts. He conceded that he recorded a statement with the police but denied that its content was the version contained in the testimony of PW7.

In cross examination, the accused stated that prior to his arrest, he lived in Huruma Estate in a house owned by a Kikuyu lady. He confirmed he was arrested while hawking his wares. He agreed he knew the village elder, PW3 who lived the opposite side of his house and knew his house. He stated that both PW3 and PW7 visited him in the police cells but denied that PW7 took his shoe and trouser in the presence of PW3. He denied PW2 was present during his arrest. He stated that he is not the one who guided the police to Malaba in arresting other suspects as his rural home is far from where they visited. Finally, he stated that he did not know the deceased.

EVALUATION OF EVIDENCE

After the close of the defence case, both counsel for the accused and the State submitted they would leave the court to make a determination based on the evidence on record.

It is now the onerous duty of this court to make a determination of the following key elements constituting the offence of murder;

- a. **Proof as to the fact and the cause of the death of the deceased.**
- b. **Proof that the death of the deceased was a consequence of an unlawful act or omission on the part of the accused which constitutes the *actus reus* of the offence.**
- c. **Proof that the unlawful act or omission was committed with malice aforethought which constitutes the *mens rea* of the offence.**

As to the fact of the death of the deceased person, this was undoubtedly confirmed by PW1, 2, 3, 4, 5 and 7. PW1, 2, 3 and 7 visited the scene where the deceased's body was dumped after he was killed. They were able to positively identify the same as belonging to Samuel Mungai Njoroge. PW1, 2 and 3 were personally known to the deceased prior to his death. PW7 was among the police officers who visited the scene after being raised by police officers from Baharini Police Post. PW4 was a scene of crime officer who saw the body at the mortuary as he compiled his report. PW5 on the other hand is the doctor who conducted the postmortem. In his findings reflected in the post mortem form which he produced in court formed an opinion that the cause of the death of the deceased was transection of the cord by a sharp object. It now behooves the court to determine whether the death of the deceased was caused by an unlawful act or omission on the part of the accused person.

At the very initial stages of investigations the evidence available was purely circumstantial. I say so because it is PW3 a village elder who tracked some blood stain trail from where the body lay to the house believed was occupied by the accused. At the time of those events the said house was locked and the accused was not present. However, when the accused was placed in cells the trouser he was wearing and his left shoe were laced with blood stains. This was noted by PW7, the investigating officer. In the presence of PW3, PW7 took possession of the said trouser and shoe and caused them to be subjected to a DNA analysis which was done by PW6. When the accused was taken to hospital for age and mental assessment, his blood sample was taken. During the postmortem exercise blood sample of the deceased was also taken. In addition, when PW7 visited the house of the accused person he also took blood sample with cotton swab consisting of the blood that was strewn all over the house. There was a collection of a pool of blood beneath a PVC carpet that covered the floor. That is where he dipped the cotton swab. From the evidence of PW6, the government analyst, the blood in the cotton swab matched the blood of the deceased. That then entirely clears any doubt that the accused had a direct contact with the deceased. The evidence then available is direct evidence.

The accused gave an alibi defence in which he stated that as at 3rd September, 2010 the night the deceased is said to have been killed, he was at Moi Teaching and Referral Hospital taking care of a friend who had been admitted. On the following morning of 4th September, 2010 he alluded that he did not

return to his house after leaving hospital. Instead, he went straight to his business in Eldoret Town where he used to hawk.

When an accused tenders an alibi defence, it behooves the prosecution to dislodge the same. Simply put, the court ought to determine whether the accused's alibi casts doubt in the mind of the court that he did not commit the offence. See the case of **Kiarie -vs- Republic (1984) KLR, 739** in which the Court of Appeal sitting in Nairobi in Criminal Appeal No. 93 of 1983 held that;

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge, does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces in to the mind of a court a doubt that it is not reasonable. The Judge had erred in accepting the trial magistrate's finding on an alibi because the alibi had not been supported by any reasons. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi.”

I will then grapple with the question as to whether the accused's alibi raised a doubt as to whether he was involved in the death of the deceased. From the detailed testimony of PW7 he stated that he took possession of the accused's shoe and trouser in the presence of PW3. He also testified that after the body of the deceased was found and the blood stains led to the accused's' house, members of the public got angry, agitated and bayed for his blood. Therefore, in as much as he would have wanted to take the accused to his house so that he could identify it himself he was apprehensive that if the members of public saw him, they would attack him. In those circumstances, he had to seek the assistance of a person well known in the area the accused lived to identify the house. That of course was PW3 who was the village elder. He was not only acquainted with accused's house, but knew him very well. Consequently, with the wisdom of PW7 he took possession of the keys of the house of the accused from the accused in the presence of PW3. The keys opened the house identified by PW3 as belonging to the accused. That scenario could not be regarded as a coincidence that the keys the accused gave to PW7 opened his house. In any case, in the cross examination of the accused by the learned state counsel, he admitted that, PW3 not only knew him but that he (PW3) knew his (accused) house. I have no doubt that it was the accused's house that was opened with the keys he gave to PW7. And as fate had it, it was in this house that the heinous murder was executed. It revealed an orgy site covered with blood, from the floor to the table and curtains. All that evidence crystalized together directly linked the accused to the offence. Furthermore, although the accused gave a sworn defence, the same did not in any way dislodge the strong prosecution's case implicating him. In the circumstances, I find that the prosecution's case has successfully dislodged the accused's alibi. I have no doubt in my mind that he is the person who murdered the deceased.

It is also important at this juncture that I comment on PW7's evidence relating to the journey he made to Malaba to arrest some suspects who had been named by he accused. The accused in this regard denied that he had told PW7 about the three suspects he allegedly implicated in the murder. He also denied he told the investigating officer that the three suspects had been sent by a witch doctor one Omoding to look for two legs and a finger of an imbecile. My humble considered view is that PW7 could not have travelled to Malaba without a tip-off from a source. It cannot also be a coincidence that the deceased's body was found without the two lower limbs and one finger. From the investigations of PW7, after arresting the suspects from Malaba, he found out that they were not connected with the murder and he released them. I am convinced that the accused must have told the story to PW7 so as to distance himself from the offence. However, from what is on record it leaves no doubt that the death of the deceased was a ritual killing. It must have been intended that his legs and the finger be taken somewhere for ritual purposes. They were never recovered and the deceased was sadly buried with his mutilated body.

But what was the motive behind the greasily murder of the deceased? The question places the burden on the court to make a determination of whether the accused was possessed of malice aforethought when he killed the deceased. Malice aforethought is defined under Section 206 of the Penal Code as follows:

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.**

Although no witness(es) gave evidence that they had knowledge that the accused intended to kill the deceased, the manner in which the killing was executed demonstrates that the accused sat down, crafted and finally executed the mission. And this is discerned by the systematic mutilation of the body parts whose whereabouts remain unknown to date. From the evidence of PW6 the cause of the death was transection of the cord by a sharp object. From the photographs produced by PW5, the scene of crime officer, they corroborate the said evidence. From one of the gruesome photographs exhibited is an open deep cut on the left side of the back of the deceased's neck. It was described by PW6 as **“deep cut of the occipital region through the vertebrae and through the spinal code (transection of the cord) 13x8cm.”** With this on record it is safe to conclude that the accused first slaughtered the deceased from the neck after which he proceeded to mutilate his legs and the finger. The pictures of the mutilated torso were also produced by PW6. That sequence of the killing was of a person who had calculated his move to kill the deceased with a purpose. Only an evil mind could have executed the murder in the manner the deceased died. With that in mind the last ingredient of the offence of murder was sufficiently proved by the prosecution. The accused premeditated about his intention to kill the deceased and the same was successfully executed. No doubt the murder points to a ritual killing as at date the body parts were never found. Whatever the case, the accused was driven by an evil motive to take away the life of an innocent human being. He thus had malice aforethought when he committed the offence.

In the result, I find that the prosecution has proved its case beyond all reasonable doubt. I find the accused guilty of the offence of murder contrary to Section 203 of the Penal Code and I convict him accordingly.

DATED and DELIVERED at ELDORET this 18th day of April, 2016.

G. W. NGENYE- MACHARIA

JUDGE

In the presence of:-

- 1. Miss Mokuia for the state.**
- 2. Mr. Omboto for the accused.**