



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 5 OF 2014

(Formerly Kisii High Court Criminal Case No. 7 of 2010)

REPUBLIC.....PROSECUTOR

-versus-

JOHN RIRO NYAMOHANGA..... ACCUSED

JUDGMENT

Introduction:

1. The death of **MAGOTO MWITA MAGOTO** (hereinafter referred to as "***the deceased***") on 06/01/2010 led to arrest of the accused person herein, **JOHN RIRO NYAMOHANGA**, who was later on charged with the offence of murdering the deceased. The offence was allegedly committed at Gitugi village, Makarangwe Sub-Location, Kuria East District within the then Nyanza Province.
2. The accused formally pleaded to the information on 28/01/2010 before *Muchelule, J.* in the High Court at Kisii. He denied the offence and a trial was ordered. As the case was awaiting trial, it was transferred to this Court upon the establishment of a High Court station. That was sometimes in late 2014.
3. The case was then handled by *Majanja, J.* who indeed took the evidence of seven witnesses before he left the station. Upon this Court complying with **Section 200** of the Criminal Procedure Code, the accused person opted for the case to continue from where it had reached. That so happened where this Court took the evidence of only one witness before the prosecution closed its case. The accused person was then placed on his defence where he elected to give sworn testimony without calling any witness.

The Trial:

(a) The Prosecution's case:

4. The prosecution's case was mainly founded on circumstantial evidence. **PW1, MILICENT LUCHENDO**, was a resident of Makarambo village in Ntimaru. It was her testimony that on 06/01/2010 at around 7:30a.m. as she was still asleep in her house, she was called by her son one **KEVIN GATI MARWA (PW3)** who wanted a bathing soap to take a shower before going to school. PW1 woke up and went out of her house to assist PW3. As she stepped out of the house she saw the accused person who was her neighbour holding a *panga* as he walked towards the direction of her house. Although it was during the tobacco harvesting season, PW1 on seeing the accused person armed and since she was aware that the accused person had history of mental disorder and violence, she was engulfed with fear of being attacked and immediately took PW3

and her other child and rushed back into the house. She locked the door from inside and raised alarm.

5. According to PW1, it did not take long before people responded to her calling and gathered about 30 to 50 metres from her house. The police also came to the scene from the Ntitaru Police Station which was just nearby. The scene was however out of PW1's compound. Being then assured of her security, PW1 walked out of her house and went to where the people and the police had gathered. They were so many people. PW1 saw the deceased's body laying dead in a trench but she could not go near or even observe it properly due to the people who had surrounded it. While at the scene PW1 saw the accused person for the second time. That time round the accused person was not armed with either the *panga* or at all. PW1 did not see the accused person being arrested but she saw him walk away from the scene with the police. PW1 stated that the police then visited her home and recorded her statement from there.
6. PW3 gave unsworn testimony after the Court conducted a *voir dire* examination on him. He was a boy aged 10 years old at the time he testified. He corroborated PW1's evidence to the extent that as he was outside their house on one morning which he could not remember the date, looking for bathing soap so as to prepare himself for school, he truly called out her mother, PW1, who came out of their house.
7. However before PW3 called PW1 he had witnessed an occurrence. He stated that as he was outside their house he saw two people fighting near a road tunnel which was about 15 metres from where he was. He did not know the two people as it was his first time to see them. In the course of the fighting PW3 saw one of them trying to jump over the tunnel but fell down. That is when PW3 called out her mother, PW1, who immediately came out of their house and pulled PW3 and the other child inside the house while screaming.
8. PW3 further stated that people gathered around the trench where one of those fighting had fallen into. He also managed to go to the scene where he saw that the person in the trench had been injured on the head. He also saw the other person who was fighting with the one who had fallen inside the trench caught by the people who were at the scene and a *panga* was taken from him. PW3 could not remember how the *panga* looked like and he never saw it again. Later in the day PW3 was interrogated by the police at their home.
9. **PW2** was also at the scene where people had gathered. He was **JAMES MUNIKO CHACHA**, a Clerical Officer with the Ministry of Lands. PW2 was at his home on that morning which was about 150 metres from the scene. He heard screams from many people and decided to follow the direction where the screams came from. The screams led him to the scene where he met many people who were saying that one Magoto was died. It took PW2 around 10 minutes to reach the scene. PW2 also met the accused person, who was his brother's son, at the scene with a *panga*.
10. PW2 confirmed seeing the deceased's body in the trench by the road side. It was facing up. He readily recognized the deceased since he was his neighbour. He noted that the deceased's body had several cuts on the legs, arms and the head was split. PW2 described the scene as 'a trench on the side of a murram road which is usually used by vehicles and that there was a house and kiosks around it'.
11. While PW2 was at the scene, word was going round that it was the accused person who had killed the deceased. Sensing the possibility of the accused person being attacked by the members of public and with a view to remove the accused person from the scene, PW2 cleverly asked the accused person to accompany him to the Ntitaru Police Station just to report the incident. PW2 however observed the *panga* which the accused person had but found no blood stains on it.
12. Upon reaching the Ntitaru Police Station, PW2 reported the matter and the police recorded his statement and accompanied him back to the scene. It was PW2's further testimony that the police also called a Doctor from Kehancha District Hospital to the scene where the Doctor conducted an autopsy and thereafter the police handed over the deceased's body to his relatives.

13. The deceased's post mortem examination was conducted by **DR. W. E. OKUNGA** on 06/01/2010 who filled in and signed a Post Mortem Form which is evenly dated. However the Post Mortem Form was produced by **DR. JARED OKOTH NDEGE (PW4)** on behalf of the Doctor who had conducted the autopsy. PW4 was familiar with the handwriting of the one who had filled in and signed the Form as the two were professional colleagues and had worked together for a period of 3 months. According to the Post Mortem Form the autopsy was conducted at the Ntitaru Sub-District Hospital. The deceased's body was identified by **CHACHA MUNIKO** and **MATIKO MAGOTO**. The body was of a male African of about 58 years old in good nutritional status. It was 5 feet and 3 inches in length and it was fresh at the time of the autopsy.
14. On examining the external appearance of the body, the head had a deep 8 cm long cut wound at the face extending to the left eye, nose and mandible with another cut wound on the right parietal region. The neck had a 4cm long cut wound and the left hand ulna joint was broken. The right fibia-tibula was fractured and there was a deep cut wound around the left knee. The Doctor formed the opinion that the deceased's cause of death was as a result of severe hemorrhage as a result of multiple cuts.
15. PW4 also produced a P3 Form for the mental assessment of the accused person which was conducted and filled in by a **DR. OKELLO** whom PW4 also knew and was familiar with his handwriting as the two were known to each other since their days in Medical School. The assessment was conducted on 13/01/2010 at the Kuria District Hospital and the P3 Form was filled and evenly dated. According to the assessment, the accused person was not fit to stand trial. The P3 Form was also produced as an exhibit.
16. Despite the foregone, the said **DR. STEPHEN OKELLO** was later on called and testified as **PW6**. He confirmed the contents of the P3 Form he had filled and dated as stated by PW4 that the accused person was not fit to stand trial by the time of the assessment. He also clarified that the condition the accused person was then in was not permanent though.
17. The investigations into the deceased's death were undertaken by one **No. 230391 CI EVANS OMUGA** who testified as **PW5**. By the time PW5 carried out the investigations he was the OCS of Ntitaru Police Station but was later transferred to Mweiga Police Station in the same capacity sometimes in March 2010. PW5 informed the Court that on 06/01/2010 at around 07:45 am while on duty at the Ntitaru Police Station the accused person was brought by members of public who included his uncle, PW2, who carried a panga. He was informed that the accused person had murdered someone at Gitungi Village along the Ntitaru-Kehancha road. PW5 took possession of the panga and booked the accused into custody. He observed that the panga was clean and had no blood stains. He also took the accused person's coat, shirt and trousers which had blood stains and also noted that the trousers had some brain matter for further analysis.
18. PW5 left with one PC Osia and in the company of PW2 and headed to the scene. He found the body of the deceased in a trench and observed that it had several deep cut wounds all over. He called the scenes of crime officers who came and took photographs after which he collected the body to Kehancha District Hospital Mortuary for an autopsy. While at the scene PW5 interviewed several witnesses who confirmed that the accused person had actually cut the deceased. He also recorded statements from some witnesses including that of PW1 and PW3 whom he described as eye-witnesses and his very crucial witnesses. He then prepared an Exhibit Memo Form and forwarded the all the necessary items to the Government Chemist for analysis. He also prepared a sketch plan of the scene and produced the panga, the Memo Form and the sketch plan as exhibits. PW5 also recalled that he took the accused person to Kehancha District Hospital where he was assessed to be mentally fit to stand trial and then preferred the charge of murder against him.
19. **PW7** was an Assistant Government Chemist who was attached at the Government Laboratories in Nairobi. He was one **STEPHEN MATINDE JOEL**. He had been a Government Analyst for more than 15 years. He testified that he received some items from Ntitaru Police Station with a request to analyse and ascertain whether the items were stained with blood and to establish its

- possible origin. The items included a piece of brown shirt marked deceased, green long trousers marked deceased, green checked coat marked accused person. The items were accompanied by an Exhibit Memo Form.
20. PW7 carried out the examinations and found out that both the shirt and trousers were lightly stained with human blood. However all attempts to generate a DNA profile from them were unsuccessful. PW7 also found out that there were no blood stains on the accused person's coat. He then prepared the Report dated 25/08/2015 which he signed and produced in Court as an exhibit. He also informed the Court that the items were collected by a police officer from the Ntimaru Police Station.
21. The said items were later produced by **PW8 NO. 81670 CPL. HELEN KOECH** as exhibits.
22. And with the foregoing evidence the prosecution rested its case. In a ruling rendered on 16/11/2015 the Court placed the accused person on his defence.

(b)The Defence case:

23. The accused person opted for and gave sworn testimony without calling any witness. He denied the offence. It was his testimony that he only knew the deceased as an employee of PW2 and as a Night Watchman and that he only knew PW1 as a tenant near his home whom she had loaned Kshs. 5,000/= but was yet to repay him. The accused person however stated that he was an uncle to PW2 although he had some land disputes with him.
24. He recalled that on the material day he was woken up by his wife at around 07:00am and told that there were some noises in the neighbourhood. He quickly dressed up and followed the direction the noise came from. He met PW1 and PW2 standing on the road and he enquired from them what the matter was. PW2 informed him that his worker had been killed and dumped by the roadside. He then proceeded to where the body was and saw that it was in a trench by the roadside facing upwards. There were so many people at the scene. The accused person saw a spear, an arrow and a panga next to the body. He was then asked by PW2 to accompany him to the Police Station to report the incident and that is when he so found his way to the station. It was his testimony that they were also accompanied by PW1 and PW3 to the Police Station.
25. On reaching the station, they all recorded their statements and were released but for him who was detained and was to be released later on. He was shocked that instead he was charged with the offence.
26. And with that evidence, the defence case was closed.

The Parties Submissions:

27. The defence filed and relied on written submissions. The defence revisited the entire body of evidence and made reference to case law in submitting that the circumstantial evidence on record cannot be a basis of convicting the accused person with the offence of murder as the evidence fell short of the required standard in law. The case of **Republic -vs- Michael Muriuki Munyuri (2014) eKLR** was referred to in support of the call to acquit the accused person.
28. The prosecution submitted that it was relying on the evidence on record in support of the charge against the accused person.

Analysis and Determinations:

29. I have carefully considered the evidence on record as well as the exhibits and the Counsels' submissions. As the accused person is charged with the offence of murder, the prosecution must prove the following three ingredients: -

(a) Proof of the fact and the cause of death of the deceased;

(b) Proof that the death of the deceased was the direct 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 said unlawful act or omission was committed with malice afterthought which constitutes the ‘mens rea’ of the offence.

I will therefore consider each of the issues independently.

(a) Proof of the fact and cause of death of the deceased:

30. It is not in dispute that the deceased died. That fact was proved by PW1, PW2, PW3, PW4, PW5 and the accused person. On the cause of the deceased's death, PW4 confirmed that a post mortem examination on the deceased was conducted on 06/01/2010. The Doctor formed the opinion that the deceased's death was as a result of severe bleeding due to multiple cuts secondary to assault.

31. Since there is no any other evidence contradicting that of PW4, this Court hence concurs with the medical finding that the deceased died as a result of severe bleeding due to multiple cuts secondary to assault.

(b) Proof that the death of the deceased was the direct consequence of an unlawful act or omission on the part of the accused person:

32. This issue is aimed at establishing whether it was the accused person who actually caused the death of the deceased and if so, whether it was by an unlawful act or omission on his part.

33. As it stands out now, it is evident that what tends to connect the accused person with the deceased's death is purely circumstantial evidence. I say so because despite PW5 alleging that he recorded statements from eye-witnesses none of them testified before this Court. Apart from PW1 who stated that she saw the accused person with a panga, none of the witnesses testified to have witnessed the accused person attack and injure the deceased. Resulting therefrom, I must therefore closely examine the evidence on record, not only as my normal calling as the trial Court, but also to ascertain whether the evidence satisfies the following requirements: -

(i) *The circumstances from which an inference of guilt is sought to be drawn, must be congenitally and firmly established;*

(ii) *The circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

(iii) *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.*

34. The foregone principles were set out in the *locus classicus* case of **R -vs- Kipkering arap Koske & Another (supra)** and have repeatedly been used in subsequent cases including the Court of Appeal cases of **GMI -vs- Republic (2013) eKLR**, **Musii Tulo Vs. Republic (2014) eKLR** among many others.

35. The Court of Appeal in the case of **Musii Tulo (supra)** in expounding the above principles expressed itself as follows:-

“ 4. In order to ascertain whether or not the inculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilty, we must also consider a further principle set out in the case of Musoke v. R (1958) EA

715 citing with approval Teper v. R (1952) AL 480 thus:-

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

36. The chain of events leading to the arrest and arraignment of the accused person before this Court came from the three witnesses being PW1, PW2 and PW5.
37. PW1 confirmed seeing the accused person armed with a panga when he was called by her son PW3. PW1 knew the accused person too well as he came from her neighbourhood and she had known her for about 3 years. Being worried of a possible attack on herself and her two children since the accused person had a history of mental instability and violence in the village, PW1 quickly withdrew back into her house with her children, locked the door from inside and raised alarm. It was her testimony that by the time she came out of her house the scene was full of people and that the police had already arrived. When PW1 went to the scene she saw the deceased lying dead in a trench but did not know how he met his death. PW1 also saw the accused person at the scene who was but not armed with the panga as she had seen him at the first instance.
38. PW2 also arrived at the scene after the deceased had already met his death. He however confirmed seeing, among many other people, the accused person who was his uncle. As there was word going round that the accused person was he one who had attacked and killed the deceased, PW2 purposed to cleverly remove the accused person from the scene. That he did by asking the accused person to accompany him to report the matter to the Ntamaru Police Station and the two so left.
39. According to PW2, he saw the accused person with a panga at the scene. He carefully observed the panga but found no blood stains on it. That position was confirmed by PW5, the Investigating Officer, who took possession of the panga and eventually produced it as an exhibit before Court.
40. PW5 stated to have only received the accused person at the police station when he was brought by members of public on allegations of having killed the deceased. Among them was PW2 who carried the panga. PW5 arrested the accused person and put him in custody as he left to visit the scene.
41. Although PW3 saw two people fighting and one fell into a trench and died, he did not know any of them at all. Further the involvement of the Government Chemist in the investigations which was well intended to ascertain whether there was any connection between the accused person and the death of the deceased did not bear any fruits. PW7 stated that he could not generate any DNA profiles from the samples forwarded to him.
42. There was also the unsettled issue on how the accused person was arrested. According to PW1 the accused person was not arrested but walked away with the police when the police visited the scene. That means the accused person was at the scene when the police arrived. PW2 had a different version altogether. To him he asked the accused person to accompany him to the police station so as to avoid a retaliatory attack as word had it that he was the one who had caused the deceased's death and that on reaching at the station the accused person was arrested and locked in cells. PW2 also stated that when he led the police to the scene, they left the accused person in the police cells. It therefore meant that the accused person was not at the scene when the police visited.
43. PW3 witnessed the person who had been engaged in the fight with the deceased arrested and disarmed of the panga by members of the public. It was also not clear whether PW3 witnessed the disarmament before or after he was taken back and locked into their house by PW1. PW3 however did not state what happened to that person thereafter.
44. The evidence of PW5 on the arrest of the accused person was also at variance. The police only

arrested the accused person at the police station when he was taken there by members of public.

45. It is indeed surprising that even the manner in which the accused person was arrested could not be settled. May be that has a bearing on the 'turn of events' alluded to by PW5 on the witnesses who had allegedly 'witnessed' the accused person attack the deceased. Be that as it may this Court remains only bound by the record.

46. With the foregone state of evidence, this Court is not satisfied that the circumstances taken cumulatively have formed a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused person and none else. The much this Court can glean from this case is suspicion that the accused person caused the death of the deceased. That being so this Court remains alive to the truism that suspicion alone even though so strong cannot be a basis of a conviction in a criminal case. That was the finding in the Court of Appeal case of ***James Tinega Omwenga v. Republic (2014) eKLR*** where it held that: -

“ 20 Based on the evidence on record, we find that the only thing that connects the appellants to the offence is suspicion.....”

It is trite law that suspicion alone cannot be the basis for inferring guilty. In Mary Wanjiku Gichira vs. Republic -Criminal Appeal No. 17 of 1998, the court held,

'suspicion however strong cannot provide a basis for inferring guilty which must be proved by evidence.'

See also this Court's decision in Sawe vs. Republic (2003) eKLR 364.”

47. It is therefore the finding of this Court that the prosecution has failed to establish that it is the accused person who caused the death of the deceased.

48. But even if this Court was to find that the accused person was the author of the deceased's death, there still remains the issue of his mental capacity which was also not settled. Both PW1 and PW2 who knew the accused person quite well stated that the accused person had a history of mental instability. That position was confirmed by PW6 who did a mental assessment on the accused person on 13/01/2010 and filled in a P3 Form to that effect. That Report was produced before Court as an exhibit.

49. I have carefully gone through the record and noted that the Court ordered for subsequent mental assessment of the accused person before the trial started. Although the Court was informed that the second examination revealed that the accused person was in a position to stand trial, that report was however not produced in evidence.

50. Given that the prevailing evidence on record regarding the mental status of the accused person reveals that the accused person was not fit to stand trial, then any attempt to conduct a trial before settling the issue would only result to a mistrial. With such a finding still a conviction cannot stand in law.

Disposition:

51. Having therefore found that there is no nexus between the accused person and the commission of the offence, it will serve no purpose at all for me to deal with the third ingredient.

52. The upshot is that the information of murder facing the accused person has not been proved. The accused person is hereby found not guilty of the murder of **MAGOTO MWITA MAGOTO**. He is hereby set at liberty unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of July 2016

A. C. MRIMA

JUDGE