



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL CASE NO. 83 OF 2007**

REPUBLIC.....PROSECUTOR

**VERSUS**

JULIUS LESHO TENGESI.....1<sup>ST</sup> ACCUSED

GEORGE KIMANI KINOTI.....2<sup>ND</sup> ACCUSED

**JUDGMENT**

Julius Lesho Tengesi and George Kimani Kinoti (*the accused*) are jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code (*Cap. 63, Laws of Kenya*).

2. The prosecution alleged that on 13<sup>th</sup> day of July 2007 at Ngamini village in Nyandarua District within Central Province they jointly murdered Joseph Kimani Kariuki, alias Sendeu.

3. To prove its case against the accused, the prosecution called nine witnesses. I have read and considered their evidence. Abdallah Karungo Kinyanyiro (PW1) and Mary Njeri Gichangi's (*Mama Njeri*) parcels of land were separated by a stream. Mama Njeri's land was leased to Mary Njoki Fundi (PW4).

4. It was PW4's testimony that on 14.07.2007, she was irrigating her parcel of land when she noticed something she described as a "square carton" but later realised was a sack. After observing it for sometime, she decided to throw a stone at it and once hit, the sack started to float up the water towards PW1's side of the stream. Alarmed PW4 decided to call her neighbour PW1 who in turn called other people.

5. According to the testimony of PW1, it was the worker of Njeri Gichangi (*Mama Njeri*) who was sent to call him at about 5.00 p.m. and he was alerted by the barking of his dogs. He was informed that something looking suspicious had been found in the river. PW1 rushed to the river which he estimated to be 150 metres away from his house. He was shown the sack upon his arrival, and noticed it was the usual 70 – 100 kg sack, and blood was oozing from it. It was about 1 metre from his side of the stream. PW1 observed that the reeds were disturbed suggesting that something had slid through them.

6. Mama Njeri observed again that there appeared to be a body in the sack. At that stage other people were called, among them Patrick Njogu Ngugi (PW2), who opened the sack and found a human body of a male person, together with 2 metal pipes (3" *G.I. bends or elbows*) in a black plastic bag. PW1 also testified that upon checking closely, they established that body was that of Sendeu (*the deceased*).

7. When cross-examined PW1 testified that he called the Police once the body was identified and he thought that Julius (*1<sup>st</sup> Accused*) may have some information about the body as they worked together with the deceased, and Julius was the deceased's subordinate or junior. Both worked for Beatrice Wanjiku Majai (PW5) who had leased part of PW1's land and that the two workers stayed on the farm. The deceased had his own separate quarter. He had Julius summoned through emissaries who returned with the two accused.

8. On being questioned on the whereabouts of the deceased, 1<sup>st</sup> accused informed PW1 that the deceased had gone to church in Gilgil on Saturday – the same day in the morning, and that this was contrary to his knowledge, because he was aware that the two never attended any church in Gilgil but attended one in a place called Magut about 4 km away from the farm.

9. The accused showed no shock or emotional regret when informed that the body of the deceased had been recovered from the river but that they looked afraid due to the presence of many people at the scene.

10. The 2<sup>nd</sup> accused expressed ignorance of the movements of the deceased or that he had gone to any church. The accused were however not asked whether they had seen the deceased the previous night.

11. Though the Police were called between 5.30 – 6.00 they came to the scene after darkness had set in, and upon their request members of the public removed the body and placed it in the Police vehicle and the Police also took away the accused as suspects for investigation.

12. However before the Police left, PW1 showed them the quarters of the accused to which they had access. The deceased's door was however locked and none of them had the key to it, so the Police broke the door and gained entrance to it. On his bed the Police found a Motorola cell-phone together with a receipt dated 5.07.2007, PW1 also testified that he knew the accused by their nick-names, he knew the 1<sup>st</sup> accused as Julius, and Maasai and Kimani (*2<sup>nd</sup> Accused*) whom he also knew as Nginyira, and had known the deceased for about one year. PW1 had no suspect in his mind but because the accused worked with the deceased, he thought they may have had some information on the whereabouts of the deceased.

13. In this regard PW2 testified that the 1<sup>st</sup> Accused had on that day (*13.07.2007 at about 7.15 pm gone to his kiosk and requested for torch batteries which he informed him he would pay upon receipt of his salary from his employer*).

14. He was however informed by Joseph Njoroge Karanja that he had been informed by PW1 to come and see a strange sack which was on PW1's side of the river. It is PW2 who volunteered to enter the water and opened the sack only to see an arm, and confirmed to the rest that the sack contained a human body. He peeled off the polythene paper in which it was wrapped. A lady in the crowd recognized the T-Shirt as that of the deceased. PW2 himself checked and confirmed it was the deceased's body. It was the metal pipes which made the sack heavy.

15. PW2 knew both accused as well as the deceased. He used to see them daily, but did not know whether they lived together. He remembers the 1<sup>st</sup> accused answering questions from the crowd that he thought the deceased had gone to church on that Saturday as he was a 7<sup>th</sup> Day Adventist member.

16. PW3 was informed by PW1's wife, Nyokabi about the strange sack found in the river. His evidence tallied with that of both PW1 and PW2 and confirmed that he had known the deceased for about 6 months and that he worked in PW1's farm but did not know whether he lived alone.

17. PW3 also testified that he accompanied the Police to the accused's house. He noticed from the Police torch that the grass was disturbed, they noticed gum boot marks suggestive of someone had been dragged along the place.

18. PW3 also confirmed that he and PW1 went to the quarters of the deceased's co-workers. They

found both accused together. When questioned of the whereabouts of the deceased the 1<sup>st</sup> accused informed them that the deceased had gone to church in Gilgil and would not be coming back, and he noticed the 1<sup>st</sup> accused was frightened and denied any knowledge that the deceased had died.

19. PW5 was the employer of the 1<sup>st</sup> accused. PW6 was among the people who recovered the body from the river. Apart from the body, there were metal pipes, in the sack, and noticed that the deceased had serious head injuries.

20. PW7, Dr. Fredrick Kariuki produced the post-mortem report prepared by Dr. Kiema who carried out the post mortem on the body of the deceased. The doctor found the deceased had suffered *deformed skull with open skull involving the occipital parietal and both temporal area with multiple skull injuries, deformed jaw with bite marks and loose teeth both upper lips and incisors and canines. The head had suffered massive subdural haematoma involving both occipital lobes and parietal lobes with depressed underlying brain matter with ruptured vessels.*

21. He put the cause of death to cardiopulmonary arrest due to severe head injury caused by massive blunt trauma.

22. PW8 Corporal Samuel Njoroge responded to the telephone from PW1 and went to the scene with two of his colleagues. After retrieving the body they proceeded to the quarters of the deceased and the accused, and recovered two trousers and a T-shirt which belonged to the 1<sup>st</sup> accused. He also recovered gumboots. Also recovered from the 1<sup>st</sup> Accused was a cell-phone, Motorola together with a receipt. PW8 produced the two metal reducers as PEx. 1(a) & (b) and cell-phone Motorola and receipt as Pexh. 2(a) & (b) and trousers as Exh. 3 and T-shirt, PEx. 4 and gumboots as Pexh. 5. PW8 testified that he was unable to establish the ownership of the boots that were being worn by the 1<sup>st</sup> accused.

23. The clothes recovered were sent by P.C. Jacob Leyaro to Government Chemist for analysis and also clothes of 1<sup>st</sup> accused. PW8 also confirmed that he interviewed the accused and established that they had differences over debts owed to them by the deceased, some shs 2,000 – 2,500/=.

24. PW9 was the Government Analyst. He produced a Report of a Government Analyst (Pexh. 6) which found that Item E (*the jacket*) was slightly stained with human blood of Group A and the blood sample (*Item 9*) was found to be of Group "A".

25. When put to their defence, 1<sup>st</sup> accused gave sworn evidence. He denied ever living with, or working with the deceased, and that no blood sample was taken from him. He also denied ever working with PW5. He denied ever having a cell-phone and heard about first in court.

26. The accused admitted however that there was one jacket and trouser which he was wearing and that he was told to take off by the Police. He had met the deceased only once, and had no debt with him.

27. When cross-examined by State Counsel, the 1<sup>st</sup> accused denied that PW5 was his employer and that his employer was one John Njoroge but was unable to get him to testify on his behalf as he did not know where to get him. He denied any dealings with PW1, or the deceased, was not living with the 2<sup>nd</sup> accused and that he was arrested because he was within the area. He explained the blood stains in the jacket because he had been beaten by members of the public and that the blood stains were his. He denied living with the 2<sup>nd</sup> accused, and that he himself and co-accused were never taken to hospital, that John Njoroge was real although he could not trace him.

28. On his part the 2<sup>nd</sup> Accused testified that he knew PW1 who hired him to burn charcoal and share the quantities equally. He had however met the deceased on the Wednesday and was introduced to him as Sendeu, but never worked with him, and also never lived with the 1<sup>st</sup> Accused. He confirmed that he was arrested because he was found in the house of the 1<sup>st</sup> accused, and were found cooking, that he ate while standing, that the crowd came with anger, arrested and tied his hands with ropes behind his waist,

and then was taken to PW1. The 1<sup>st</sup> accused further testified that he had no dispute with the deceased but admitted that the gumboots were his, and were soiled.

## **ANALYSIS OF EVIDENCE AND SUBMISSIONS**

29. Mr. Orege learned counsel for the accused submitted that the State had not established in its evidence that the accused had committed the offence of murder, that the evidence was purely circumstantial, that there was no eye witness.

30. I accept counsel's submission that there was no eye witness, that the evidence against the accused was purely circumstantial. But as the ancients said, "*there is no derogation to say that the evidence was circumstantial. For often circumstantial evidence is the best evidence. It is the evidence of all the surrounding circumstances which go to prove a point with the accuracy of mathematics.*" Such evidence must however be weighted and applied according to laid down principles.

In **TEPER VS. R (2) [1952] AC 480, at 489**, the court said -

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

31. This principle was reiterated and applied by the Court of Appeal in the case of **MWANGI VS. REPUBLIC [1983] KLR 522** where the court held *inter alia* -

***(i) an offence of murder can be established by evidence tendered directly proving it or by evidence of facts from which a reasonable person can draw the inference that murder had been committed;***

***(ii) in a case depending exclusively on circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of accused's guilt from the circumstantial evidence to be sure there are no other co-existing circumstances which would weaken or destroy the inference. The facts surrounding the first appellant's possession of the property of one of the deceased persons and his posing as the deceased were incompatible with the appellant's innocence and inconsistent with any other conclusion."***

32. The same principles were expressed by the Court of Appeal in the case of **SAWE VS. REPUBLIC [2003] KLR 364**.

33. Applying these principles to this case, the questions which arise are -

***(i) whether there are any inculpatory facts which are incompatible with the innocence of the accused and are incapable of any explanation upon my other hypothesis than that of guilt of the accused, and***

***(ii) whether there are other co-existing circumstances which would weaken or destroy the inference of guilt.***

34. On the first question whether there any inculpatory facts which are inconsistent with the innocence of the accused and incapable of explanation apart from that of guilt, it is correct that there was no eye witness. The evidence was purely circumstantial. This however was that evidence.

35. PW5 testified that the deceased was his employee, a farm worker on land she had leased from PW1. PW5 also testified that she knew the 1<sup>st</sup> accused and that she and her partner Charles Kinyua, had employed him as a watchman. She had known him for about one year, from the days she had employed him in Gilgil where she had leased another parcel of land, that 1<sup>st</sup> accused was an employee of PW1, but

lived in one of the farm houses which was part of the land leased.

36. PW1 too testified that the 1st accused was known as an employee of PW5 and 2nd accused was his employee. PW1 also testified that the 1st accused worked with the deceased as both of them were watchmen, though 1st accused worked for a lady called Beatrice Wanjiku Majai (PW1). PW1 knew of no acrimony between the 1st accused and the deceased but was aware of arguments between them over their work.

37. PW1 testified that upon being questioned, 1st accused stated that the deceased had gone to Church in Gilgil. When informed that the deceased's body had been found and recovered from the river, he was afraid (*due to the many people*), but the 2nd accused expressed a different view from that of the 1st accused, he was not aware of the deceased's movements, or that the deceased had gone to any church.

38. PW2 too testified that the 1st accused and the deceased used to work together. PW2 corroborated PW1's evidence that 1st accused when questioned on the whereabouts of the deceased answered that the deceased may have gone to church as he was of the 7th Day Adventist Church.

39. PW3 also corroborated the evidence of PW1 and PW2 that the 1st accused told them "*the deceased had gone to church in Gilgil and would not be coming back*". He also noticed that the 1st accused got frightened as he was being questioned by them as to where the deceased was and denied knowledge of the deceased's death.

40. PW8 established that the deceased owed the 1st accused sh 2,000/=

41. Lastly, PW9 the Government Analyst testified that the blood stain on the 1st accused's jacket was of Blood Group "A", like that of the deceased.

42. In answer to this testimony the 1st accused swore **firstly** that he did not kill the deceased, and **secondly** that he never worked with him, **thirdly** that he had never lived and worked with his co-accused, the 2nd accused, **fourthly** that he had never worked for PW5, **fifthly** that no blood samples were taken from him, **sixth**, that he was never taken back to his residence after being taken to PW1, **seventh**, that though he was searched, he only heard of the cell-phone in court. **Eighth**, the blood-stain on his jacket was due to injuries he suffered in the hands of the crowd, **ninth** that he had only met the deceased once and that the deceased had not debt with him. **Tenth**, he had known the 2nd accused for 6 months and the 2nd accused kept his tools in his house, **eleventh** that he was arrested because he was new in the area, where he had stayed for only 4 months.

43. Comparing this evidence with that of the prosecution, it is clear to me that the 1st accused is not being truthful although he swore to tell the truth. **Firstly** when asked where the deceased was, he told PW1 and others that the deceased had gone to church in Gilgil and would not be coming back. He got scared when he was informed that the deceased body had been recovered from the river. To say that he never worked with the deceased was untrue. Both of them were watchmen, and knew each other. He would not say that the deceased had gone to church in Gilgil and would not return if he did not know the deceased. He variously says he had stayed in the area for 4 – 6 months. PW1 testified as much. It is true that no blood sample were taken from him, there was no independent evidence even from PW8, the Investigating Officer, that 1st accused was injured by members of the public in the course of his arrest. The blood sample taken from the deceased was found to be Blood Group "A" matching the blood stain on his jacket as Blood Group "A". It is more likely that the Blood "A" found on his jacket did not come from him but rather from the deceased. It would thus mean that though the 1st accused made all efforts to clear and distance himself from the killing of the deceased, the blood sample gave him away.

44. The question however (*which is the second issue*) is whether there are other co-existing circumstances which would weaken or destroy the inference of guilt on the part of the 1st accused, apart from the track of lies of not working with or not knowing the deceased, and existence of the blood stain on his jacket). There are several such facts.

45. **Firstly, PW1** testified that the motorolla cell-phone and its receipt were recovered from the deceased's house after the door was broken into upon the instructions of PW1. In total contradiction, PW8 testified that he searched and recovered the cell-phone and part of the receipt from the pocket of the 1st accused.

46. **Secondly** PW1 stated that he is the one who assembled the T. joint of the metal water pipe. There was no evidence for what purpose he had assembled the T-joint and Reducer, and where he placed or kept them. He testified that he was away on that Friday leading to the Saturday when the deceased's body was recovered. There is therefore no proper explanation as to how those metals got into the sack in which the deceased's body was wrapped and sank into the river, for it to float later.

47. **Thirdly** PW4 testified that PW1 recognized the sack as the one he had given "to Maasai". When and how long had "Maasai" had this sack before it became his burial shroud.

48. The circumstances weaken, but do not destroy the inference particularly from the blood sample, and the statement "*that the deceased had gone to church in Gilgil and would not to return*" are inculpatory facts which are incompatible with the innocence of the 1st accused. I therefore find 1st accused guilty of the murder of the deceased contrary to Section 203 of the Penal Code, and I convict him accordingly.

There were no similar or inculpatory facts which are incompatible with the innocence of the 2nd accused. The 2nd accused was not a co-worker with the deceased. The deceased did not owe him any money or shs 2,000/= as in the case of the 1st accused. Though he admitted that the boots were his, they were found in the 1st accused's house where he had gone and found the 1st accused cooking, and that he ate while standing.

PW3 testified that there were gum boot marks at the deceased's house, and that the grass was disturbed suggesting that "*someone had been dragged along the place.*" There was no forensic evidence that the gumboot marks were made by the 2nd Accused's boots, or to conclude that the 2nd accused was among the persons who dragged the deceased or someone else outside the deceased's house.

Consequently I find no circumstances directly connecting the 2nd accused with the murder of the deceased. I therefore acquit him of the offence of murder of the deceased and unless otherwise lawfully held, I direct that he be released forthwith.

I invite counsel to make submissions on sentence in respect of the 1st accused.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of July, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**