



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 82 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES MWANGI MUTHONI.....1ST ACCUSED

DANIEL ONTIERE MOCHOGE.....2ND ACCUSED

JUDGMENT

The accused persons are charged jointly with the murder of Frankline Kinyua Mabaabu (the deceased) on 19th January, 2007 at Mwariki Estate in Nakuru. The deceased was last seen on the night he met his death by **P.W.1 George Mwiti (Mwiti)** when he went to Mwiti's house at about 8p.m. to arrange for some work the next day. The deceased was in the company of a certain man.

That very night at more or less the same time (8 - 9p.m.) he also visited a cousin, **P.W.2 Cephaz Muriithi (Muriithi)** in the same estate he lived. He spent only five minutes with Muriithi and left. He was alone. The deceased was to join Mwiti and **P.W.3, Gitobu Kinyua** for some work the next day but failed to turn up. The following day Muriithi visited the deceased but was shocked by the state of his house.

There was blood all over the house and household goods strewn everywhere. Upon seeing the state of things in the house, Muriithi went for the caretaker of the property and both of them returned to the house. They found the deceased dead with stab wounds. The matter was reported to the police who commenced investigations. In the course of those investigations, the police learnt that the deceased person's mobile phone could not be traced.

The phone was tracked in Bungoma in the possession of **P.W.4, George Kibe Gaturu (Kibe)**, a telephone technician. Kibe explained that on 19th January, 2007, the 1st accused took the phone to his Nyeri workshop for repairs. When the 1st accused delivered the phone to the workshop, Kibe was away and the former was attended by his employee, **P.W.5, Edward Mwangi (Mwangi)**. He later met the 1st accused and issued a receipt to him after making part payment of Kshs.1,500/=. Later in the year 2007, Kibe relocated to Bungoma where he opened a shop. While relocating, he took with him items he considered sensitive, for instance phones which had been repaired including the phone delivered by the 1st accused and those fitted with cameras.

In August, 2007 he learnt that the police were investigating a case of murder involving the mobile phone which he had received from the 1st accused. He was arrested in Bungoma and it is him who led the

police to Nyeri where the 1st accused was arrested. Kibe's employee, Mwangi, confirmed that the 1st accused delivered to him the phone in question in the company of a lady, who later on, after one week returned to collect the same but was turned away.

The investigating officer, **P.W. 7, P.C. Ngati** explained how through the help of Safaricom, the police were able to track the mobile phone in question with Kibe. P.C. Ngati and her colleagues arrested Kibe who led them to Nyeri where they arrested and interrogated the 1st accused. 1st accused in turn claimed he had been given the phone by the 2nd accused to get a technician. On the basis of that, the 2nd accused was sought and arrested.

Because some witnesses had alleged that when the deceased was last seen by some of them he was in the company of a stranger, it became imperative upon the arrest of the accused persons, to conduct an identification parade. The parade was conducted in respect of the 1st accused only by **P.W.9 C.I. John Owuoth** on 28th August, 2007. Out of the three witnesses who participated in the parade only one was able to pick out the 1st accused as the stranger who was last seen in the company of the deceased.

Meanwhile, the postmortem examination conducted by **P.W.8, Dr. Paul Gachunga** revealed that the deceased suffered deep stab wound on left lower jaw penetrating to the neck and a deep stab wound on the back. It was further observed that the trachea and esophagus were cut and the lungs collapsed. The doctor concluded that the deceased died of cardiopulmonary collapse due to foreign body in the airway due to damaged esophagus and trachea.

The 1st accused gave a sworn statement in his defence and called three witnesses. He swore that he had never been to Nakuru in his entire life until his arrest in this matter. He testified that on 19th January, 2007 at about 11a.m., the 2nd accused asked him to get a technician to repair his phone as the latter was new in Nyeri.

The 2nd accused was in the company of his girlfriend, Josephine. As the 1st accused took the 2nd accused and Josephine to Kibe's workshop, the 2nd accused received a telephone call and remained behind. The 1st accused proceeded with Josephine to Kibe's workshop. They left the phone with Mwangi. The 1st accused and his three witnesses were unanimous that there was a pool table tournament organized by the present Member of Parliament for Nyeri Town. The tournament was in the premises where the 1st accused was employed as pool table attendant. During the night under inquiry – 19th January, 2007, he reported on duty at 8p.m. and worked past 8p.m.

He confirmed that an identification parade was conducted for him but he argues that the same was flawed for the reason that there were other persons in attendance including the arresting officer; that prior to the parade, he was exposed to witnesses when he was sent outside to throw rubbish in the bin.

For his part, the 2nd accused also denied playing any part in the death of the deceased and maintained he had never been to Nakuru prior to his arrest. He had lived in Nyeri for over five years working as a barber in the salon belonging to his witness, Kellen Nyiha (Kellen) and later starting his own pool table business. He was introduced to the 1st accused in August, 2007, several months after the murder of the deceased. He had intended to employ him as a pool attendant. On 25th August, 2007, the 1st accused called him to inform him he had some problems. They agreed to meet at Nyeri Teachers' Sacco but the 2nd accused did not find him forcing him to go the Spinners Club where the 1st accused worked as a pool attendant. At the club, the 1st accused person's employer informed the 2nd accused that the 1st accused had been arrested. Both the employer and the 2nd accused went to the police station.

At the police station, the 2nd accused was also arrested and both accused persons transferred to Bondeni Police Station, Nakuru. He learnt he had been arrested in connection with a mobile telephone which belonged to the deceased. He denied knowledge of the phone and the fact that he gave it to the 1st accused to take it to a technician. He had no girlfriend by the name Josephine.

Kellen, in her evidence confirmed employing the 2nd accused as a barber in her salon. She also confirmed that on the 19th January, 2007, the 2nd accused was on duty from 8a.m. to 8p.m. That constitutes, the summary of the evidence presented at the trial.

I have considered that evidence, both for the prosecution witnesses and for the defence as well as submissions by counsel for the accused persons along with the authorities relied on. The broad issue in this trial is whether the accused persons jointly with malice aforethought caused the death of the deceased.

There being no direct evidence of their doing so, the prosecution case is based solely on circumstantial evidence as the accused persons have also raised the defence of *alibi*.

As against the 2nd accused, the only evidence relied on is that the 1st accused upon being arrested implicated him with the ownership of the phone which was alleged to belong to the deceased. The 1st accused told the investigating officer, P.C. Ngati that he had been given the phone by the 2nd accused and on that ground alone the investigating officer charged the 2nd accused. The 1st accused himself reiterated that evidence and explained that the 2nd accused sought his assistance because he (the 2nd accused) was new in Nyeri town.

It is established law that evidence of an accused person against his co-accused is the weakest kind. Before acting on such evidence, the court must warn itself of the danger of acting on such uncorroborated evidence because such evidence is self-serving and is intended by the accused person presenting it to extricate himself. See **Bakari & Another V. Republic**, (1987) KLR 173 and also **Wanjiku V. Republic** (2002) 1 KLR 825. The only reason why the 2nd accused is said to have sought the assistance of the 1st accused regarding the repairs of the phone was because he was new in Nyeri town, a fact not borne out by evidence of the 2nd accused and Kellen, both of whom insisted that the 2nd accused had worked in Nyeri since 2005. The 1st accused himself while being cross-examined said he met the 2nd accused in 2004 in Nyeri. The 2nd accused therefore did not require the assistance of the 1st accused in such a mundane matter as repairing of a mobile phone. There is no suggestion that the 2nd accused person's sim card was ever used in the phone.

Mwangi's evidence was specific that it was the 1st accused and not the 2nd accused person, in the company of a lady, who took the phone for repairs. Similarly, Kibe was categorical that it is the 1st accused he dealt with and went to his workshop several times. As a matter of fact, Kibe issued a receipt in the name of the 1st accused as the owner of the phone.

Although he knew the 2nd accused by seeing him in town, Kibe told the court that in connection with the phone, the 2nd accused played no role. Clearly, the evidence against the 2nd accused cannot be relied on for the reasons stated.

Turning to the 1st accused, the following are the circumstantial evidence against him:

- i) that on 19th January, 2007 at about 8p.m. he was seen in Nakuru by Mwiti in the company of the deceased;
- ii) that Mwiti subsequently identified him in the police identification parade;
- iii) that he delivered the mobile phone allegedly stolen from the deceased to Mwangi/Kibe for repairs;
- iv) that he claimed to Mwangi and Kibe that the phone belonged to him,

The court can only base a conviction on circumstantial evidence if it irresistibly points to the guilt of the

accused person to the exclusion of all others and only if there are no co-existing circumstances to weaken or destroy the inference of the accused person's guilt. See **Republic V. Kipkering Arap Koske & Another** (1949) 1 EACA 135 and **Simeon Musoke V. Republic** (1958) EA 715 and **Sawe V. Republic** (2203) KLR 364.

The evidence that the 1st accused was in Nakuru with the deceased on 19th January, 2007 came from Mwiti. Three things must be noted from that evidence. The alleged meeting was at 8p.m. Secondly, that evidence is not clear whether or not Mwiti knew the person he claimed to be the 1st accused prior to 19th January, 2007. Mwiti said:

“I went and found him (the deceased) with another person I knew physically not by name. Kinyua (the deceased) carried his companion on his bicycle and left.....”

(Underlined words are mine)

Talking of how he picked out the 1st accused in the parade he stated that:

“He was the person I saw with Kinyua on the fateful night..... I identified him by features. I had seen him twice before the identification parade.”

But in cross-examination, Mwiti said the following:

“It was my first time in my life to see the one accompanying Kinyua..... When I heard Kinyua was dead, I did tell his parents that he had been in the company of someone I had seen before. I said he was a Meru as he was talking Kimeru..... Kinyua did not tell me the name of the accused. He only told me he found him stranded and was going to help him trace his relatives. He had offered him accommodation for the night.”

The third issue is that according to Mwiti, the man he saw in the company of Kinyua was a Meru by tribe and spoke the Meru language.

It is in doubt if the witness knew the person who was with Kinyua prior to 19th January, 2007; they met at night and it has now emerged that the 1st accused person is not a Meru by tribe neither does he speak the language. With that doubt, it is likely that being at night, Mwiti was confused as to who he had seen. The 1st accused has categorically stated that he had never been to Nakuru before. The burden was on the prosecution to disprove that *alibi*.

The other aspects of Mwiti's evidence that I am unable to understand is how in his evidence he told the court that the deceased person was accommodating his companion for the night of 19th January, 2007 but to the investigating officer, Ngati stated that the companion spent three (3) nights in the house of the deceased.

In view of the foregoing, the evidence of identification parade is worthless and especially so because it was flawed. The identification parade form is in such a state that even the parade officer, C.I. John Owuoth was surprised. There are cancellations and entries that have not been explained. It is shown in the form that both the accused persons attended the parade yet the parade officer confirmed he has never seen the 2nd accused person.

Again, it was the evidence of the parade officer that the 1st accused took the position between member No. 6 and 7 in the parade but in the form he is the last person – No.9. Contrary to Police Standing Order, the investigating officer was present as the parade was being conducted. I reiterate that the parade was flawed.

Finally, on the issue of the mobile phone, it was Muriithi who informed the police that the deceased had a

phone which could not be traced after he was found murdered. But according to him, the mobile phone was a Vodafone black in colour. The phone that was produced is indeed Vodafone “*by sharp*” and the phone found with Kibe which it is alleged was delivered to him by the 1st accused is also Sharp. It was for the prosecution to prove that it was one and the same phone, by bringing evidence of serial number as such phones are common in the market.

According to the investigating officer, they got the deceased person’s telephone number from Muriithi. Muriithi himself did not say so in his evidence - only stating that he did not know the serial number of the phone. But more significantly, it is not clear from the entire evidence where mobile No.0725462828 alleged to be for the deceased was obtained. The print out from Safaricom is equally of no use as it does not indicate the phone number it relates to. There is a list of numbers and dates without any explanation what they represent – whether in-coming or calls made.

There is absolutely no evidence that the phone recovered from Kibe is the same one the deceased had. There is also no evidence as to the last time the deceased had his phone before his death. It may have been lost before his death and not necessarily stolen at the time of his death. The circumstantial evidence does not irresistibly point to the guilt of the accused persons. After all there are many co-existing factors that weaken any inference of their participation in the death of the deceased.

The prosecution was duty bound to prove the charges against the accused persons beyond reasonable doubt. They failed. The investigations were inapt. As a matter of fact, no evidence was called from the neighbours of the deceased, landlord or even the so-called girlfriend of the 2nd accused person, Josephine.

There was an opportunity to get leading evidence from the scene given the state of the house. The murder weapon – a knife, was left at the scene. The investigating officer found no use for it and simply produced it in court, yet through forensic examination, it was possible to get some leads from it.

The charges fail and are dismissed. The accused persons are acquitted and shall be set free forthwith unless lawfully detained.

Dated, Signed and Delivered at Nakuru this 8th day of March, 2011

**W. OUKO
JUDGE**