



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 22 OF 2007

REPUBLIC STATE COUNSEL

VERSUS

MOSES NDWIGA NJERU ACCUSED

JUDGMENT

The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are as follows:-

“MOSES NDWIGA NJERU:- On the night of 3rd and 4th days November 1998 at Karia sub location in Meru Central District within Eastern Province, murdered GEORGE MBAABU NAIVASHA.”

This is a retrial. PW1 stated that the accused was her boyfriend and she knew the deceased. She was a bar maid at Gisisi Market. On 3rd November 1998 at about 10pm when she was working at the bar the accused and the deceased came to that bar. They took alcohol until 10.30pm. They moved to the next bar and took alcohol up to 11pm. In that second bar they were consuming local brewed alcohol called ‘naicu’. From there they went to yet another bar. She joined the accused and the deceased in this 3rd bar. After taking alcohol in that bar, the three of them went to the accused house. At one time, the accused left her with the deceased when he went to purchase some ‘chang’aa’ for their consumption. When the accused returned with the ‘chang’aa’ the deceased said that he was going home to sleep. Both the deceased and this witness declined to drink the ‘chang’aa’. This witness said that the deceased house was 600 metres from the accused house. When the deceased left the accused house, this witness remained and she with accused went to sleep. At about 2a.m. she woke up to go to the toilet which was outside the house. She, however, found the door of the house locked from outside. The accused was not inside the house. Earlier in the evening, she had noted that the accused was wearing a black faded jeans and a yellow shirt. About 1½ hours later from the time she had tried to go to the toilet she heard the accused and she opened the door for him. She noted that he was dressed as he had been earlier on in the evening. She stated that she did not notice any disagreement between the deceased and the accused. She also did not see the accused carrying anything when he entered the house. The following day the accused wore yellow faded trousers and a white T-shirt. The clothes that the accused had worn the night before when he entered the house in the night he placed them under the mattress. That is, he placed them between the bed and the mattress. She stated that the accused’s other clothes in his bedroom were hang on the clothes line. The following morning, this witness and the deceased girlfriend went to take tea at the shopping centre. Thereafter, they returned together to the accused house thereafter. This witness stated that the accused refused to allow them to leave his house. She stated:-

“I wanted to tell the accused I was going to work. He refused both of us to leave. He took stool (sic) at the door and he was holding a panga. Other than stopping us, he was not talking to us.”

At 1p.m. that day, the brother of the deceased came and told them that the deceased had been killed. The accused ran to the deceased’s house and took a sheet which he used to cover the body of the deceased. The body of the deceased was outside his house about 3 meters from the door. On being cross-examined, PW1 confirmed that the deceased and the accused were friends. She stated that on that night before the two had not quarreled. She also stated that she could not confirm whether the accused had gone to use the toilet when she found the front door locked from the outside. She also confirmed that the accused was the first person to report the death of the deceased to the police. When the matter was reported to the police this witness, the deceased girlfriend and the accused were all arrested. This witness and the deceased girlfriend were subsequently released when they recorded their statement. PW2, Patrick Marangu was brother of the deceased. He said that the accused was their cousin. He noted when he found the deceased killed on 4th November 1998 that he had been cut on the neck and had 7 stab wounds on the chest. In his opinion the deceased struggled with the person who killed him because the deceased front door was damaged. He said that they found his body at 4pm. He further stated that the accused and the deceased were doing business together of harvesting sand and selling ‘*changaa*’. That they often quarreled over their sharing of the money of those two businesses. PW3 Julius Gitonga Naivasha is a brother of the deceased. He confirmed that the accused had business with the deceased and also stated that they sometimes had disagreements over their business dealings. The last quarrel over their business between them was about a month before the death of the deceased. He noted that when he went to the deceased house that there was a trail of blood through the gate of the deceased house. The blood trail from the main house up to the gate. When he went to inform the accused that he had found the deceased dead outside his house, the accused reacted by saying:-

“Where are they?”

It was not clear to this witness what the accused was referring to. When they arrived with the accused at the deceased house the accused covered the deceased body with a sheet. He noted that the deceased body only had underwear and sandals. This witness also stated that the deceased had separated with his 2nd wife with whom they had two children. They separated because of disagreement. In respect of those disagreement, this witness said:-

“I did not ask them (deceased and his 2nd wife) why they were fighting.”

He however said that by the time the deceased was killed, he had a girlfriend called Kaimuri. He did not know whether the deceased disagreement with the 2nd wife was because of the deceased extra marital relationship. On being questioned by the court, this witness said that when he told the accused that the deceased was dead, the accused did not look shocked. That he reacted as though he was aware of something. PW4 was a government analyst who produced a report carried out on black faded jeans belonging to Moses Ndiga Njagi. It is important to note that the accused is called Moses Ndwiga Njeru. An analyses was carried out on a panga and a cream jacket of George Mbaabu Naivasha the deceased. The report stated as follows:-

REPORT

1. *The pair of long trousers of the suspect (item A) and the jacket of the deceased (item C) were each slightly stained with human blood of group ‘O’.*
2. *The panga (item B) was heavily stained with human blood of group ‘O’.*

On being cross examined, PW4 stated that the items were found to have human blood type ‘O’. He however said that the deceased blood was not submitted for analyses. PW5 Lucy Kaimuri said that she was a girlfriend of the deceased. She became a girlfriend after the deceased separated with his wife. They however were not living together. She confirmed that she was in the company of the deceased and the accused on 3rd November 1998 at Karia Market. They parted ways and the deceased and the accused

went together. She did not see the deceased alive again. The following day at 8pm the accused went to her home and asked her to go to his home to see a visitor. When she went she found PW1. Whilst they were there, she asked why the deceased had not come to the accused house. In chief, this witness stated that the accused responded by saying that he had called the deceased whilst at the river which was about 50 meters away and the deceased had answered him. However on being cross examined, this witness retracted much of her evidence she adduced in chief and said that she did not record in her statement with the police that the accused had said he called the deceased while at the river. She also agreed that she did not state in her statement that the accused prevented her to go out of his house to check on the deceased. She also confirmed that she did not indicate the clothes that the deceased wore the night before his death. She attributed her failure to not state so in her statement, to the fact that no such questions were not put to her. The investigating officer PW4 stated that the death of the deceased was reported by members of the public. When this witness together with other officers arrived at the deceased home they found his body lying next to the door of his house in a pool of blood. In the house, they saw a lot of disorder. There was maize scattered on the floor. The bedroom door was broken into. This witness noted that the deceased throat and stomach had been cut. He noted several other cuts. He recovered from the deceased house a panga with a lot of blood and a knife. He stated that when he begun his investigation, he had three suspects. Whilst carrying out his investigations, he recovered long trousers which were in a basin under the accused bed. The trousers had blood stains. He also recovered a jacket from the deceased body. The trousers, the jacket and the panga were taken to the government chemist for analyses. On being cross examined he stated that the death of the deceased was reported by the accused PW1 and the brother of the deceased. This witness stated that the deceased home was bordering Karia Market. Near the deceased home, there were four other homes in which people were living in. His investigations revealed that the deceased and the accused had been together on the night of 3rd November 1998. That when PW1 found the door of the accused house closed, she was unable to tell him when the accused returned into the house because she was drunk and was asleep. The accused in his defence said that he and the deceased had businesses together and they were in laws to each other. He confirmed that they were in the company of each other on 3rd November 1998. They drank alcohol from 5pm to 6.30pm. Thereafter they went looking for PW1. They reached the bar where PW1 works at Gisisi at 7.30pm. They took more alcohol at that bar. Thereafter they went to three other bars. When they went to his home in the company of the deceased and PW1, the deceased sent him with a 100 shillings to go and buy alcohol. They drunk that alcohol inside his house. They drunk up to 12am when the deceased said he was going to sleep. The accused went to sleep with PW1. The following day he PW1 and 5 went to take tea at a nearby hotel. He thereafter begun to sell 'changaa' to his customers as PW1 and 5 took 'changaa' in his house. At 1pm, PW3 came to his house screaming that the deceased his brother had been killed. His first reaction he said was to take a panga to see what had happened to the deceased. He went to the deceased house in the company of PW1 and 5 and many other people. On the way, on being told the deceased was dead he dropped the panga. At the deceased home, he noted that the deceased had been cut and there was disorder in the house. The door leading to the deceased bedroom was broken. He saw in the deceased house a panga and a knife which were eventually collected by the police. These were the ones that were forwarded to the government analyst. He denied killing the deceased and said that PW1 and 5 lied in their testimony since they had been directed to implicate him in the present offence.

The prosecution did not present direct evidence showing that the accused killed the deceased. The evidence that the prosecution relies on in this case is circumstantial evidence. The test of such evidence was stated in the case **Benson Limantees Lesimir & Ano. Vs. Republic** Criminal Appeal No. 102 & 103 of 2002 where the Court of Appeal stated:-

“In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of R. vs. Kipkering arap Koske & Another 16 EACA 135 where it was inter alia held that:-

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

The circumstantial evidence presented by the prosecution is that after the deceased left the home of the

accused on 3rd November 1998 the accused followed him and committed the murder. To that end, the prosecution relied on the evidence of PW1. PW1 said that the accused had sometime in that night left his house and returned later when he changed his clothes. PW7 the investigating officer stated that PW1 informed him that the accused and the deceased left together and she was unaware when the accused returned because she was drunk and asleep. That evidence and more particularly because of its contradiction does not point to the accused killing the deceased. The same is inconsistent and cannot be relied on. Neither can evidence of PW3 and 5 be relied on in respect of what the accused did the following day. It will be recalled that although PW5 said the accused prevented her from leaving his house to go to the deceased house, when she was cross examined she confirmed that she did not record that evidence in her statement before the police. The government chemist analysis report as reproduced above in this judgment stated that the trousers produced did not belong to the accused but to another person called Moses Ndiga Njagi. The accused name is Moses Ndwiga Njeru. It cannot be said that the two names referred to the same person. It therefore is doubtful if those trousers belonged to the accused. Further, the police failed to provide the government chemist with a sample of the deceased blood. Without the knowledge of the deceased blood group, it is difficult to categorically state that the blood found on the trousers of Moses Ndiga Njagi was the blood of the deceased. The panga and the knife mentioned in the government chemist report were recovered in the deceased home and not in the accused home. Their ownership despite PW5 saying that the panga produced before court belong to the accused its ownership to date is unknown. The government chemist report shows doubt whether the accused committed the offence. The circumstantial evidence therefore fails the test of showing the guilt of the accused. The evidence before court merely shows that the movement if any of the accused on the night in question were suspicious but that does not prove the accused committed the murder beyond reasonable doubt. In regard to that finding, a case in point is **Joan Chebichii Sawe vs. Republic** Criminal Appeal No. 2 of 2002 where the Court of Appeal stated thus:-

“In our judgment, the evidence does not satisfy the legal requirements of circumstantial evidence to warrant or justify the conviction of the appellant on the basis of the evidence on the record. We are, therefore, unable to uphold the conviction entered by the learned trial judge. We have evaluated the evidence as we are entitled to at great length and there is really nothing left to connect the appellant with the death of the deceased except mere suspicion. The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this court made clear in the case of Mary Wanjiku Gichira vs. Republic (Criminal Appeal No. 17 of 1998) (unreported), suspicion however strong cannot provide a basis for interfering guilt which must be proved by evidence.”

The suspicious acts and movements of the accused do not suffice even in this case for this court to infer guilt on the part of the accused. In the light of that, I hereby acquit the accused of the charge of murder of George Mbaabu Naivasha. I order the accused to be set free unless he is otherwise lawfully held.

Dated, signed and delivered at Meru this 19th day of May 2011.

MARY KASANGO
JUDGE