



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Criminal Case 108 of 2005

GEORGE KIRONJI

HINGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The accused herein, **George Kironji Hinga**, (hereinafter referred to as the **accused**) is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the charge are that on the 25th day of July, 2005, at Gachie village in Kiambu District, within the Central Province murdered **Holida Njeri Kamau** (hereinafter referred to as the **deceased**).

The prosecution called 9 witnesses in support of its case.

Dr. Peter Ndegwa (PW 1), a pathologist, working with the Ministry of Medical Sciences in the Department of Diagnostics and Forensic Science, recalled undertaking post-mortem on the body of a female **Holida Njeri Kamau**. The body was identified by Moffat Kamau and Simon Muigai Mwangi. It was blood soaked. The skull was smashed and bandaged with laceration of a parietal area. Other lacerations were on both sides of the supra orbital areas. There was evidence of displaced parietal skull fracture, brain displacement and intracranial hemorrhage. The doctor formed the opinion that the cause of death was severe brain contusion due to severe head injury due to a blunt trauma. He signed and dated the post-mortem report which he produced as exhibit 1.

Dr. Zephania Kamau (PW 2), based at Police Surgery in Nairobi received one **George Kironji Hinga** from Karuri Police Station. He was requested to access his age, mental status and to examine him for any injuries.

He opined that the accused was aged 33 years. He had a scar on the left forehead and mid-frontal scalp. He gave the good doctor a history of mob justice on 25th July, 2005. The injuries were consistent with a blunt object. He had earlier on been attended to at Karuri Health Centre. He assessed the degree of injury as harm. In his opinion the patient was fit to plead. He completed and signed the P3 form which he produced in evidence as exhibit 2.

Simon Wahungu Kamau (PW 3) recalled that on 25th July, 2005 at 8.00 p.m he was parking his matatu,

on his way home from work, when one Mungai informed him of the tragedy at his father's plot. On arriving at the house of his sister, Holidia Njeri Kamau, he found a large crowd. He only saw blood at the door of the shop. He noticed the accused who was wearing a shirt on which was written "NO EXCUSE", a jeans jacket and trouser. The accused tried to run away when he saw PW 3, who followed and managed to subdue him. A mob that had gathered at the scene assaulted him. He was frog marched to Kihara Police Post. Visibility at the scene was aided *inter-alia* by the headlights of PW3's motor vehicle. He saw a blood-stained stone at the scene with plaited hair piece on it. Where the incident took place was covered by a concrete floor. He knew the accused, who was his brother-in-law, before that incident.

Moffat Kamau Mungai (PW 4), father to the deceased, testified that the deceased was living in one of his (PW 4's) plots after separating with her husband. The plot was about 200 metres from his house. That the deceased children were living with them (grandparents) at the time of the incident.

On 25th July, 2005 about 8.00 pm he was watching Television in the company of his wife, Penina Kega, his daughters, Leah Nungari and Sarah Wanjiku, when a lady known as Mama Njeri reported that the accused was assaulting the deceased. His daughters, Leah Nungari and Sarah Wanjiku, were the first to reach the scene. Almost immediately he joined them at the scene. He found the deceased on the ground and bleeding from the forehead and nose. The accused was standing straight, by a well, within the compound where deceased was having a shop-cum-residence.

Inside the deceased house a small lamp was on. He arranged for the taking of the deceased to Kenyatta National Hospital. At about 10.00 pm she was pronounced dead. The body was then transferred to City Mortuary. He went back home at about 11.00 pm and reported to his wife that their daughter was no more. The accused person who had accompanied the deceased to hospital and returned with the same matatu was then set upon by a mob that had gathered at the plot where the deceased was living.

Most importantly PW 4 testified that there was bad blood between the accused and the deceased. They used to fight on and off and were actually separated at the time of the incident. That notwithstanding the accused kept on stalking the deceased.

The following morning the police visited the scene of crime. It is then that he saw **a stone with hair** on it. It was the plaited hair piece his daughter had on the fateful day. That the subject stone was among the ones he had brought to finish a house at the plot where the deceased was living. The police took away the stone to be used as an exhibit. When accused attempted to run away, his son, Simon Waihungu Kamau (PW 3), chased, subdued and caught him about 400 metres away. It is then that members of the public that had gathered at the scene assaulted the accused. He saved accused from mob justice.

Visibility was not a problem because at the house of the deceased a lamp was on. In addition there was also moonlight that fateful night.

Joseph Kagunda Kimani (PW 5), a Government Analyst, attached to the National Laboratories, produced a report signed and dated 1st August, 2005 by John Kimani Mungai, a colleague, under section 33 as read together with section 77 of the Evidence Act. He was familiar with the signature and handwriting of John Kimani Mungai whom he had worked with for 10 years.

According to the report, on 3rd August 2005, the following items were received, by John Kimani Mungai, from P.C Philip Nguthu of Karuri Police Station;

- 1. A blood sample in a bottle marked exhibit A of deceased -Holidia Njeri Kamau.**
- 2. A stone in a polythene paper marked exhibit B. – stone with blood stains**
- 3. A blood sample in a bottle marked exhibit C. of accused – George Kironji Hinga.**
- 4. A white blue jeans, stripped long sleeved shirt in a Khaki envelope marked exhibit D (I) of the accused.**

5. A blue jacket in a Khaki envelope marked exhibit D2 of the accused.

The observations of the Government Analyst were as follows:

- 1) The stone exhibit B, the long sleeved stripped shirt exhibit D1 and the blue jeans jacket exhibit D2 were all heavily stained with blood of human origin.**
- 2) The DNA profiles generated from the blood stains on the above items and from the reference blood samples were tabulated and produced at the end of the report.**

The Government analyst findings were as follows:-

- 1) The DNA profile generated from the blood stains on the stone exhibit B marched the one generated from the blood sample in the bottle marked Holida Njeri with a probability of match of 1 in 1.26×10^{16} raised to power 16.**
- 2) The DNA profile generated from the blood stains on the shirt exhibit D1 and from the jacket exhibit 2 matched the bottle marked George Kironji with a probability of match of 1 in 3.93×10^{13} raised to power 13 match.**

The report dated and signed by John Kimani Mungai, was produced as exhibit 6.

No. 59091 Sergeant Philip Nguthu (PW 6), was attached to Karuri Police Station as at 26th July, 2005. On that day at about 4.20 pm he received the accused from PC Mohammed Ali of Kihara Police Post. He was under arrest on allegation of having killed his wife, Holida Njeri, on 25th July, 2005. Along with the accused P.C Mohammed came with a stone which was marked as exhibit 3. He kept in safe custody the blood stained short and jacket the accused was wearing as potential exhibits.

On 2nd August, 2005 he attended the post-mortem examination of the deceased. He took the blood samples of the deceased. He then prepared an exhibit memo (exhibit 7) and used the same to forward the clothes and the blood samples of both the accused and the deceased to the Government Chemist for analysis.

Towards that end he marked the exhibits as follows:

- 1. Exhibit A – Blood sample of the deceased.**
- 2. Exhibit B – Stone with blood stains**
- 3. Exhibit C – Blood sample of the accused**
- 4. Exhibit D- Jeans Jacket and a white stripped shirt with blood stains.**

He produced the exhibits in the following order:-

- 1) Stone – as exhibit 5.**
- 2) Jean Jacket – as exhibit 3.**
- 3) The white striped shirt with blood stains exhibit 4.**
- 4) Exhibit Memo as exhibit 7.**

He then recorded statements from witnesses including the accused.

Thereafter he took the accused for mental and age assessment. Subsequently, the accused was arraigned in Court on 5th December, 2005 and charged with the offence of murder.

Leah Nungari Kamau (PW 7), a sister to the deceased, recalled that on 25th July, 2005 at 8.00 p.m they were watching T.V and relaxing with her sister Sarah Wanjiku in the company of her parents. A lady known as Mama Njeri (since deceased), a neighbour to the deceased, reported to them that the deceased was being assaulted. Both were living in a plot owned by Moffat Kamau (PW 4). In response to the distraught call he met the accused. Accused asked her what she wanted. She ignored him and went to the shop –cum-residence of the deceased. She found the body of the deceased on the floor. The head was out of the house while the rest of the body was inside the house. She was able to see all this with the aid of electricity light from electric pole by the road-side. A lamp inside the deceased's house was also on. The accused was standing 20 metres away from the body. He recognized accused by his voice when he asked her what she wanted. She screamed on seeing the body. Her screams attracted members of the public. Her sister Sarah (PW 8) and her father (PW 4) and mother–Penina Kega-were the first to arrive followed later by her brother (PW 3) and Mama Njeri (since deceased).

Arrangements were then made to take the deceased to the hospital. The same night her sister succumbed to her injuries. A mob that had gathered at the scene then assaulted the accused. The following morning she saw blood on the floor of the house of the deceased and a stone stained with blood and having some plaited hair piece. The stone was about 15 metres from the deceased house. The stone was collected by the police who visited the scene.

Sarah Wanjiku (PW 8), a sister to the deceased, recalled the events of 25th July, 2005. She was in company of her parents and sister Leah Nungari kamau (PW 7) and Penina Kega (her mother and also mother to deceased), when Mama Njeri reported a fight at the shop-cum-residence of deceased. On her way to deceased shop-cum-house he met the accused who asked her what she wanted. He recognized accused by his voice. He told accused that she heard that he was fighting with the deceased. Accused told her that some thugs had attacked the deceased and he had chased them. That he was still hunting for them. That explains why he was there. The accused was standing by a well, within the same compound; when she met him.

On arrival she found the body of the deceased on the floor with the head out of the door and the rest of the body inside the house. There was a lamp burning inside the house.

That night, according to the witness, there was moonlight which further aided her visibility. There was also street lights on a neighbouring road. The accused was dressed in a blue jeans jacket. She also saw a blood stained stone with plaited hair piece on it. The stone was about 10 metres from the body. She identified the stone in Court. It was her evidence that the accused was one of the people who accompanied the body to Kenyatta National Hospital. The accused came back from Hospital in the same vehicle. When it was announced that the deceased had succumbed to her injuries the crowd that had gathered at the scene assaulted the accused. He was then taken to the Kihara Police Post. Subsequently he was transferred to Karuri Police Station where he was held pending investigations.

Before this incident, the deceased was living at her father's (PW 4) plot at Gachie, while the accused was living at Karuri about 30 minutes drive from deceased house. Though the accused had come to the house of the deceased on the fateful night, the two were separated. The accused was thus a stalker.

No. 81463 Cpl. Ali Mohammed (PW 9), recalled the events of the night of 26th July, 2005. He was at Kihara Police Post. A crowd brought a murder suspect whom he identified as the accused in Court. He was not able to visit the scene that night though.

On 27th July, 2005 at 9.00 a.m in the company of Cpl Gichuku, he visited the scene and managed to recover a stone stained with blood and having plaited hair piece. He identified the stone-exhibit 5. It was his evidence that it (stone) was in front of the residence of the deceased-three(3) metres from the front door.

He handed over the stone to Sergeant Nguthu for safe keeping. He did not facilitate the taking of photographs of the scene because the deceased was not at the scene.

At the end of the prosecution case, the learned trial Judge **{Lesiit J.}**, who heard the case up to the end of the prosecution case, found as a matter of law that the prosecution had adduced enough evidence to warrant putting the accused on his defence. She then put the accused on his defence.

In his sworn statement, the accused acknowledged that he was married to the deceased for 10 years but were separated as at the time of her death. That they were blessed with 2 children.

That on 25th day of July, 2005 he went to the house of the deceased at Gachie at night. He found her injured and lying on the ground inside her house having been attacked by thugs. He did not find the thugs that had injured her. He tried to hunt for the thugs in vain. The same night he was arrested, assaulted by a mob that had gathered at the scene and taken to Kihara Police Post.

He acknowledged having met Sarah Wanjiku (PW 8), the sister of the deceased, at a well within the vicinity of the deceased shop-cum-residence.

That he was among the team that took the deceased to the hospital and returned with the same vehicle after deceased had been pronounced dead. When he came back members of the public assaulted him at the plot where deceased had sustained fatal injuries.

He denied that the stone found near the house of the deceased (Exhibit 5) belong to him. In any case, he argued, there were several stones at the scene. He acknowledged that on the fateful night he had a jeans jacket (blue in colour), a white shirt and blue trouser which were produced as exhibits in this case. He denied the charge.

On the available evidence, it is not in dispute that the deceased and the accused were husband and wife for 10 years. The couple were blessed with two children aged 10 and 2 years respectively. Unfortunately, there were domestic misunderstanding between them which culminated into separation.

The deceased then lived at her father's plot at Gachie about 200 metres from her parent's residence. She was running a shop. The accused was living at Karura about 30 minutes drive from the deceased's residence. Though they were separated the accused kept on stalking the deceased.

It is further not in dispute that the accused was at the scene of crime that fateful night. Moffat Kamau (PW 4), Leah Nungari (PW 7) and Sarah Wanjiku (PW 8) saw him in the vicinity. He does not deny this fact. His defence is that he came to see the deceased. Unfortunately his visit coincided with an attack on the deceased by some thugs who fatally injured the deceased. He found the deceased bleeding on the ground. He tried to hunt for the thugs and in the process met Kamau (PW 4), Leah (PW 7) and Sarah (PW 8).

The prosecution's case is that the accused assaulted the deceased at her residence-cum-shop. Mama Njeri (since deceased) alerted the parents of the deceased who were living in the neighbourhood. The sisters of the deceased, Leah Nungari (PW 7) and Sarah Wanjiru (PW 8) responded to the distraught call and found the accused standing near the scene with a panga in his hands. Accused sought to know what the two girls wanted. They (PW 7) and (PW 8) told him that Mama Njeri alerted them of a fight between him and the deceased. The girls went to the house of the deceased where they found deceased lying down on the ground bleeding profusely. The head was outside the house while the rest of the body was inside the house.

Against that backdrop of evidence, it is clear to me that this case turns purely on circumstantial evidence. With regard to circumstantial evidence the prosecution pieced together certain events whose sum total connects the accused with the crime, to wit:

1) That the accused and deceased had been married for 10 years and had two children aged 10

years and 2 years respectively;

- 2) That though separated, the accused was stalking the deceased; There was therefore bad blood between them;
- 3) That on the material night the accused went to the Shop-cum-residence of the deceased;
- 4) Accused story is that he found the deceased lying down having been attacked by thugs. The thugs had vanished;
- 5) The prosecution's case is that Leah Nungari (PW 7) and Sarah Wanjiku (PW 8) on answering distraught call of the deceased found the accused standing near the shop-cum-residence of the deceased. Accused had a panga in his hand. Accused asked them what they wanted. Accused then threatened them with a panga. They ignored and continued their journey to the house of the deceased.
- 6) They found the deceased lying on the ground and bleeding profusely from the nose and the head;
- 7) Moffat Kamau (PW 4) the father of the deceased also followed Leah (PW 7) and Sarah (PW 8) to the shop residence-cum-shop of the deceased;
- 8) The father of the deceased (PW 4) saw the accused standing, straight and quiet, near a well within the plot where the deceased was living;
- 9) There was moonlight that fateful night; There was a lamp on, inside the deceased house;
- 10) On reaching the deceased shop they found her bleeding. PW4 organized for her to be taken to Kenyatta National Hospital where she succumbed to her injuries at about 11.00 pm the same night. The body was then transferred to the Kenyatta National Mortuary. PW 4 returned home.
- 11) Accused was one of the people who accompanied the deceased to hospital. Accused came back in the same vehicle with PW 4.
- 12) The people that had gathered at the plot where deceased used to stay attacked the accused, when he wanted to ran away on being questioned regarding circumstances under which the deceased passed on.
- 13) Accused was frog-marched to Kihara Police Post and subsequently taken to Karuri Police Station where he was held pending the investigations and preferring of charges.
- 14) The following day PC Ali Mohammed (PW9) and PC Gichuki visited the scene and took custody of a stone which had blood and plaited hair piece. The stone was 6 metres from the house of the deceased. The police thought it would be an exhibit in the case;
- 15) Moffat Kamau Ngugi (PW 4), testified that the relationship between his daughter and the deceased was not good. They were always fighting and were separated at the time of her demise;
- 16) The Government analyst examined the specimen brought to him by the police;
- 17) The Government Analyst, upon examining the results, established by way of a report that:-
 - i) The DNA profile generated from the blood stains on the building Block Exhibit 5 matched the blood sample generated on bottle marked Holida Njeri with a probability of match of 1 in 1.26×10^{16} .

ii) The DNA profile generated from blood stains on shirt marked (D(i) and from the jacket marked D(ii) matched the one generated from blood sample in bottled marked George Kironji with a probability match of 1 in 393×10^{13} .

18. The report was admitted as Exhibit 5. It bore the date 25th July, 2006;

19. Dr. Ndegwa (PW 1) who performed Post Mortem (Exhibit I) opined that the cause of death was severe brain contusion due to the severe head injury due to blunt trauma.

I am aware that, in law, in order to justify circumstantial evidence, the inference of guilt, the incapulatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis other than his guilt. That there must be no other co-existing circumstances weakening the chain of circumstances relied on. That the burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. That it is a burden which never shifts to the party accused. In this regard I call in aid **SAWE VS REPUBLIC (2003) K.L.R Page 364 at Page 372.**

I am equally aware, that circumstantial evidence is very often the best. It is evidence of the surrounding circumstances, which by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial. In this regard, I call in aid **REPUBLIC VS TAYLOR, WEAVER & DONOVAN (1928), 21 Cr.App.R.0.**

On the totality of the circumstantial evidence, and direct evidence adduced by the prosecution, it is clear to me that the accused and the deceased were at all material times husband and wife. They were blessed with two (2) children aged 10 years and 2 years respectively. That the couple were separated. The deceased was running a shop at Gachie of a plot owned by her father (PW 4). Within the plot was a well. Though separated the accused kept on stalking the deceased. According to the accused, he used to visit his wife three (3) times a week. On the fateful night 25th July, 2006 he had as usual visited his wife but found her lying on the ground bleeding. That she had been injured by thugs. However, he did not see the thugs. He tried to look for the thugs in vain. He then assisted in taking the deceased to the hospital.

A neighbour to the deceased by the name Mama Njeri (since deceased) reported to the parents of the deceased Moffat Kamau (PW 4) and Penina Kega that a fight was taking place between the deceased and accused at the house-cum-shop of the deceased. The two younger sisters to the deceased Leah Nungari (PW 7) and Sarah Wanjiku (PW 8) rushed to the scene. On the way they met the accused standing a few meters from the house of the deceased with a panga in his hands. The accused asked the two girls what they wanted. The two girls told him they were answering distraught call of the deceased. They proceeded to the house of the deceased and found her lying down with her head outside the door and the rest of the body inside the house. She was bleeding profusely. The two girls were followed almost immediately by the father, Moffat Kamau Mungai (PW 4) and the mother, Penina Kega.

Moffat Kamau Mungai (PW 4) found the accused standing straight and quiet near a well in the plot where deceased lived. The well was about 20 metres away from the house the deceased was lying in a pool of blood. Though there was no electric light at the plot, there was moonlight. Moreover, his visibility was aided by a lamp which was inside the deceased house. He saw the body of the deceased on the ground. The accused, among other people, accompanied PW 4 when he took the body to the hospital. The doctor pronounced the deceased dead the same night.

The following morning, PW 4 saw a stone (Exhibit 5) about 6 metres from the deceased house. The same was blood stained and had plaited hair piece on it. That stone was among many which PW 4 had bought to finalize the construction of a house within the plot. The said stone was admitted as an exhibit and forensic examination by Joseph Kagunda Kimani (PW 5) established that the blood on it matched that of the deceased.

Post-mortem examination by Dr. Ndegwa disclosed that the deceased died of severe brain contusion due to severe head injury due to blunt trauma. That is consistent with injuries that could be caused by the

stone or through a fall or a stone when thrown at the body of the deceased while standing or on the ground.

Accused in his defence does not deny being at the scene that fateful night. He admits having met Leah (PW 7) and Sarah (PW 8). His only defence is that some thugs had attacked the deceased and he was merely trying to look for them in revenge when he met PW 7 and PW 8.

On the available evidence, it is only the accused who was found at the scene where the deceased was found bleeding. It is only the accused, among the residents of the plot, who saw the thugs that attacked the deceased. It is only the accused who was known to have bad blood with the deceased. As to who caused the fatal injuries to the deceased or in what circumstances the deceased was fatally injured was a fact especially within the accused's knowledge. Only he could explain specifically how the deceased sustained the fatal injuries and how the stone happened to have blood and plaited hair piece on it. It is only the accused who could explain what he was doing at the scene 30minutes drive from his residence at Karura at that time of the night. Equally, only the accused could explain who the thugs that attacked the deceased were and how they managed to disappear in the thin air from the scene though he was in the vicinity.

The appellants sworn statement in his defence does not appear to me to discharge that burden put squarely on him courtesy of section 111(1) of the Evidence Act (Cap 80) Laws of Kenya of proving circumstances which would exonerate him from blame. In doing so, I have not lost sight of the provisions of section 111 (2) of the Evidence Act which in effect provides that Section 111(1), does not diminish the obligation on the prosecution to establish by evidence the commission of the offence charged.

Having critically examined the evidence adduced by the witness for the prosecution and the defence of the accused. And having weighed the same as against the other, I find that the accused is the one who caused the death of the deceased. From the nature of the injuries disclosed by medical science the deceased died through a fall on the stone, exhibit 5, when struggling with the accused or the accused smashed her head with the said stone in the heat of the moment. Either way the acts of the accused constituted *malice-aforethought* as defined in section 206 of the Penal Code.

It is with the foregoing in mind that I make a finding that the accused is guilty as charged. I enter a verdict of **GUILTY** under section 306 (1) of the Criminal Procedure Code.

I sentence the accused to suffer death, having taken into consideration the mitigating circumstances tendered by his advocate, prescribed by the law.

The accused has right of appeal within 14 days.

Dated and delivered at Nairobi this 16th Day of JUNE, 2011.

N.R.O OMBIJA
JUDGE.