



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCCR NO. 26 OF 2007**

**LESIIT J.**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSPHAT EKIMATHI EKIRU.....1<sup>ST</sup> ACCUSED**  
**DENNIS MWITI MUCHERU.....2<sup>ND</sup> ACCUSED**  
**DICKSON REMUN AEMUN.....3<sup>RD</sup> ACCUSED**

**JUDGMENT**

The three accused persons are charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that between the night of 27<sup>th</sup> and 28<sup>th</sup> day of February, 2007 at Kwang'ang'a village Ngushishi Location of Meru Central District within Eastern province Josphat Akimathi Ekiru, Dennis Mwiti Mucheru and Dickson Aemun Ekeno murdered Galgalo Hama Bonaya.

The prosecution called four witnesses. The facts of the prosecution case was that the deceased person was found dead with his head crunched on the morning of 28<sup>th</sup> February 2007. The prosecution case was that the deceased was seen in company of the 1<sup>st</sup> accused at a bar where PW3 was the Bar Attendant. They were seen leaving the bar together at 10.30 p.m, on the night in question.

PW4 Joshua said that he saw the three accused persons walking with the deceased towards their homes. Joshua claimed that thirty minutes after the deceased and the accused persons passed him he heard screams. He then saw 3 people running from the direction the deceased and the accused person had walked. The accused persons were eventually arrested and charged with this offence.

The first accused in his defence admitted that he had been with the deceased at the bar where Douglas PW3 sells. He also admitted that he left the bar with the deceased and that he was in company with two other people who also gave statements to the Police, but who were not called as witnesses. These were one Ali and one Amos Kaimenyi. He said that the 4 of them walked together up to a junction where he parted company with the 3 and went home. He denied the offence.

The 2<sup>nd</sup> and the 3<sup>rd</sup> accused also put forward an alibi as their defence. They gave similar defence that they were together when they were arrested for the offence at around 7 a.m. on the 28<sup>th</sup> February 2007.

The second accused said that he spent the whole of the day in question working in the shamba. That in

the evening he took his sheep and goats home, and did not leave his home that night. He said that he did not see his co-accused or the deceased the whole of the 27<sup>th</sup>. That the next morning the 3<sup>rd</sup> accused visited him to borrow a spray pump and that they were arrested as they took tea in his home.

The 3<sup>rd</sup> accused said that he spent the whole of 27<sup>th</sup> in the shamba until evening and that he arrived in his house at around 6.20 p.m. He said that he did not leave the home. The 3<sup>rd</sup> accused also denied ever seeing his brother, the 1<sup>st</sup> accused, or the deceased or the 2<sup>nd</sup> accused on the whole of the 27<sup>th</sup>.

The 1<sup>st</sup> and the 2<sup>nd</sup> accused was represented in this case by Mr. Omari Advocate. While the 3<sup>rd</sup> accused was represented by Mr. Manasse Kariuki. The state was represented by Mr. Solomon Kimathi the Learned State Counsel.

The burden lies with the prosecution to prove its case against the accused persons beyond any reasonable doubt. The prosecution must adduce evidence to establish beyond any reasonable doubt that the accused persons committed the offence of murder. The prosecution must establish that the accused persons did an act of an omission actuated by malice aforethought which caused the death of the deceased. The prosecution must adduce evidence to show that the accused persons knew that the action causing death would probably cause the death or do grievous harm to the deceased.

There were four prosecution witnesses. There was however no eye witness. The prosecution is relying on circumstantial evidence that the accused persons were the last ones to be seen in the company of the deceased before he died. Section 111 and section 119 of the Evidence Act provides: to copy

**“S. 111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist: Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence. (2) Nothing in this section shall– (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or Burden of proof. Incidence of burden. Proof of particular fact. Proof of admissibility. Burden on accused in certain cases. *Evidence* CAP. 80 45 R e v . 2 0 0 9 ] (b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) do not exist; or (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.**

**119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.**

The above sections create a statutory burden upon the accused persons to explain either how they parted with the deceased or how the deceased met his death. It creates a statutory presumption that the accused persons know how the deceased died and so have the evidential burden to show how they parted with the deceased or how he met his death.

The evidence of the prosecution is inconsistent on one point. PW3 Douglas in his evidence said that he saw the first accused and the deceased drinking together. He saw them leave the bar together at 1030 pm which was the closing time.

PW4 Joshua said that he saw the deceased in the company of all three accused and he placed the time he saw them at 10 p.m.

The accused persons on the other hand have given consistent defence to the effect that they the three of them were not together on the night in question.

The 1<sup>st</sup> accused admitted that he was with the deceased, both at the bar and at the time they left together for home. The first accused stated that he was together with one Ali, a relative of the deceased and one Amos Kaimenyi as they walked home that night.

I find that the evidence of PW4 that the 2<sup>nd</sup> and 3<sup>rd</sup> accused were in company of the 1<sup>st</sup> accused and the deceased may not be reliable. It is more reliable that the 1<sup>st</sup> accused was with the deceased and two others even at the time that PW4 claims that the accused persons and the deceased walked past him as he watered his garden. This is because PW3 did not see the 2<sup>nd</sup> and 3<sup>rd</sup> accused at all that night. Further the 1<sup>st</sup> accused admits being with the deceased but explained the 2<sup>nd</sup> and 3<sup>rd</sup> accused were not with him. That being the case the statutory presumption created by the Evidence Act affects only the 1<sup>st</sup> accused, as there was ample evidence that the deceased was last seen alive in his company and that of two others. The first accused in his sworn defence told the court that he parted with the deceased, Kaimenyi and Ali at a junction which separated their way home. He said that the way to his home was right opposite the way to the home of the deceased and the two others at the junction where they parted.

The evidence of PW4 was that he heard people running from the direction he had seen the deceased and the accused and two others walking towards 30 minutes earlier. According to PW4 there was a junction towards where he saw the 1<sup>st</sup> accused and the deceased walking. He described the distance from where he was as being 30 meters to the junction. Surely it could not have taken 30 minutes for somebody to walk a distance of 30 meters. In fact PW4 estimated the time it would take to walk to that junction as 5 minutes.

There is a likelihood that the persons PW4 heard running, and the screams that he heard were totally unrelated to the 1<sup>st</sup> accused and the deceased. This is because of the time lapse between the time the group passed him going towards the junction and the time he heard the screams. PW4 also said that he did not identify the 3 people he saw running back from that direction. The evidence of PW4 in its totality was that of suspicion which cannot sustain a conviction.

The other evidence against the 1<sup>st</sup> accused is that it took long for the police to apprehend him and the prosecution's case is that he escaped from the area soon after the incident due to guilty conscious.

The 1<sup>st</sup> accused explained where he was during the period it is alleged that he had escaped. He said that he was doing his business as usual, between Nanyuki and Isiolo Markets. The 1<sup>st</sup> accused said that he was arrested on the 26<sup>th</sup> March 2007, one month after this incident for a robbery case. I find no proof that 1<sup>st</sup> accused went into hiding as no evidence was called to establish that allegation.

I find that the evidence against the 2<sup>nd</sup> and 3<sup>rd</sup> accused was only that by PW4. That evidence has been discredited as it has been shown that PW4 may have mistaken their identify.

In regard to the 1<sup>st</sup> accused I am satisfied that he discharged the statutory burden placed upon him by sections 111(1) and 119 of the Evidence Act. His defence that he parted company with the deceased when the deceased was still alive, soon after passing by where PW4 was working, is unchallenged.

In the result I do find that the prosecution has failed to prove its case against the accused persons beyond any reasonable doubt. I therefore give the three accused persons the benefit of doubt and acquit them accordingly.

**DATED SIGNED AND DELIVERED THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2011.**

**LESIT, J.  
JUDGE.**