



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL CASE NO. 9 OF 2008

REPUBLIC.....PROSECUTION

VERSUS

JAMES NJIRU JOHN.....ACCUSED

J U D G M E N T

James Njiru John hereinafter referred to as the accused is charged with the offence of Murder contrary to section 203 as read with section 204 of the Penal Code viz the accused on 6th September 2008 at Rwika in Gachoka location within Mbeere district of the Eastern Province murdered **TARASISO NJUE SAMWEL**.

The prosecution called a total of fourteen (14) witnesses.

The prosecution case is that on 7/9/2008 at 7.50am the accused reported to Gachoka Police Patrol Base saying he had fought with one Dururu the previous night at 7.30pm and that as they fought a matatu came and stopped near them and passengers alighted with all sorts of weapons and set on Dururu. He told the police that Dururu cohabited with his estranged wife. The police suspected him and placed him in the cells.

Just as the accused's report was being booked it was reported by the high-way patrol personnel that they had found a dead body at a place called RWIKA 2.5. Police went to the scene and found the body of TARASISIO NJUE SAMUEL alias DURURU lying on the road with cuts on the neck and both hands. A search for a panga at the scene and in the accused's home did not yield any fruits.

Photographs of the body taken at the scene were produced as P EXB 2(i) – (viii). Evidence adduced shows that the accused is the estranged husband of one Catherine Wanjiku James. The two were not living together as at the time of the alleged offence. On 6/9/2008 at 7.00pm PW3 was at her home milling when Catherine called her and told her she wanted help because her estranged husband had telephoned her and she was scared of going home. She however did not disclose what the husband had told her. PW3 called the mother of Catherine who is PW2 and asked her to come for Catherine. Eventually the father of Catherine (PW 4) went for her. She also told the father of the telephone calls she had received from the accused and PW4 planned to go and report the matter to the police the next day. On 7/9/2008 the police came to their home and led away Catherine for purposes of recording a statement at Siakago. She returned the next day.

PW 5 a daughter to the accused and Catherine said the accused called her on 6/9/2008. He was asking if their mother was at home. He then told her he had found somebody dead along the road.

PW 13 was on 7/9/2008 7.50am at the report office and he received a report from the accused saying he had been assaulted and injured on his right little finger. He told him he had gone to get his wife and he saw her approach being carried by a cyclist. The wife jumped off the bicycle and escaped. The cyclist stopped the bicycle and drew out a panga. The accused then raised an alarm and a motor vehicle passing by stopped and the passengers alighted, with crude weapons which they used to attack the cyclist.

PW 14 did a mental examination of the accused and found him fit to stand trial (EXB.3). PW 9 produced the post mortem report which was done by Dr. Anthony Gatheru. He said the body of the deceased had the following injuries;

- ***Several cuts on the body***
- ***Deep cut on the anterior aspect of the neck cutting through the oesophagus trachea vertebral column and carotid arteritis***
- ***Deep cut on posterior aspect of the head.***
- ***Small cut on anterior abdominal wall***
- ***2 deep transverse cuts on the hands cutting through the fingers***
- ***Deep cut on the chin.***
- ***Brain matter was coming out from the occipital cut.***

He found the cause of death to be cardio respiratory failure due to Brain Stem Transection with a sharp object.

The accused elected to make an unsworn statement in which he said on 6/9/2008 he called his wife Catherine Wanjiku on phone to find out if she had left her place of work and she said she had. He told her they would meet on the way. At the junction of Rwika he met a person on a bicycle. The person started cycling in a zigzag manner when he reached him. He dropped his bicycle and removed a panga and attempted to cut him. The accused restrained him. They struggled in the middle of the road and he was screaming. A Nissan matatu came and stopped and the assailant ran away followed by the occupants of the vehicle who caught up with him and beat him. They boarded the vehicle and left. He went and saw the chief. The next day he went to Gachoka Patrol Base to report. As he reported a report was received of a dead person at the junction. They went there and found the body. The OCS came and they went to search his house but found nothing. He said he never met his wife as planned. He said he used to escort his wife in the morning and meet her in the evening as the route was dangerous. He had disagreed with the wife and she had gone back to her parents' home. In his submissions Mr. Mugambi said there wasn't evidence enough for the accused's conviction. And that the accused's evidence is consistent and believable.

He said the post mortem evidence was that the injuries found on the deceased were consistent with a person who had been beaten by mob justice.

The murder weapon was never produced in court and to him this was not fatal. And accused was charged before full investigation had been carried out hence denying him the chance to fully prepare for his defence. He also says it has taken over one (1) year before the delivery of judgment which infringed on the constitutional rights of the accused.

This is the case before court for determination. It is not disputed that there is no single witness who testified to having seen the deceased being killed. It is also not disputed that the deceased suffered multiple injuries all caused by a sharp object. The cause of death was cardiorespiratory failure on the brain caused by a sharp object.

The evidence before the court is purely circumstantial evidence. The Black's Law Dictionary defines

circumstantial evidence as:

Evidence based on inference and not on personal knowledge or observation. Also termed **“indirect evidence”**

“This is the evidence of some collateral fact, from which the existence of some fact in question may be referred as a probable consequence”.

It is a fact that the accused and Catherine his wife had disagreed and she was living with her parents. On 6/9/2008 Catherine had received some telephone calls from the accused. Even the accused in his evidence said he had called Catherine that evening.

As a result of the calls Catherine became fearful such that she feared walking home alone. She went to PW 3's home from where she was picked by her father (PW 4) and brought home. That same evening the accused called the daughter (PW 5) inquiring about Catherine. He also told her he had found a dead person on the road. The next morning the accused person went to Gachoka police station patrol base at 7.50am to make a report. Several issues come out of his report.

- He had gone to collect his wife from Don Bosco Primary School as usual.
- He was attacked by Dururu who had a panga
- Passengers from a matatu descended on Dururu and beat him.
- Dururu cohabited with his wife Catherine.

In his unsworn statement of defence the accused admitted fighting with a man that evening. He further says he was assisted by very good passengers who alighted from the matatu and beat the attacker and they boarded their vehicle and left. He even reported to the chief that night. This good wife of the accused whom accused used to take to school every morning and accompany her home every evening was that fateful evening very worried. She confided in PW3 & PW4 that accused had telephoned that evening and she feared going home alone. If it is true he used to escort her daily why was she so fearful of him on this day? The same evening accused was calling the daughter (PW 5) to find out if Catherine was at home. PW 8 told this court that the accused had told him the Dururu man he fought with was cohabiting with his wife. No one besides Catherine knows what the accused told her that evening.

It has been confirmed through the evidence that the person the accused reported having fought with is the deceased herein. He was found lying dead at Rwika area a few metres from the main Kiritiri/ Siakago road.

Accused said the deceased had attacked him with a panga and they fought. The post mortem report (EXB 1) and the evidence of PW 9 confirms that the deceased had several cuts and deep cuts on his body. The injuries were caused by a sharp object. From accused's own evidence there was a panga at the scene! The issue of a matatu and passengers alighting to beat the deceased is neither here nor there. The doctor never said the injuries were caused by many people. He said they could have been caused by one person **OR** many people. The evidence before court is that it is one person who caused the cuts.

Counsel has submitted that since no weapon was found the accused can not be held responsible. This is a very unfortunate submission. The police officers have explained the efforts they made to recover the murder weapon in vain. The offence occurred on 6/9/2008 night and it only came to light on 7/9/2008 morning. Action was taken but nothing was recovered. There was over 12 hours between the time of offence and discovery of the body and the culprit had all the time to hide or dispose off the weapon. I know of no Law which says non-recovery of a murder weapon leads to automatic acquittal of an accused person.

Counsel has also raised issue with the delayed Judgment.

The record is very clear that this court only took over this case on 25/10/2011 after the reporting to this station on 10/10/2011. The accused made his defence on 16/11/2010 when Mr. Mugambi applied for time to file submissions. The matter has been mentioned severally for the said submissions. The said submissions were only filed by Mr. Mugambi on 25/10/2011. So who is to blame for the delay if any?

As earlier indicated there is no eye witness to this incident. The court is relying on circumstantial evidence. In the case of *NZIVO –VS- REPUBLIC [2005] 1 KLR 699* it was held:

“In a case dependent on circumstantial evidence in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It is also necessary before drawing the inference of the accused’s guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

And in *REPUBLIC –VS- NYAMU & 2 OTHERS CRIMINAL CASE NO. 81 OF 2004 [2005] 1 KLR*. It was further stated that ***“in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of any explanation upon any other reasonable hypothesis than that of guilty.”***

The prosecution has shown that the accused had a reason to waylay the deceased. He was a bitter man. He alleged that the deceased was cohabiting with his wife Catherine (PW 8). He called Catherine that evening and Catherine had to take refuge at the home of PW 3. She told PW 3 and her father PW 4 of her fears.

The accused met the deceased who was alive that night. The story of the matatu and passengers was his own creation. The injuries inflicted on the deceased were very serious deep cuts. They were not accidental. They were pre-meditated and the result was obvious. If indeed the deceased attacked the accused how come the latter had no single injury on himself? Even his demeanor at the police post as he reported was suspicious causing PW 8 to order him remanded. The accused had informed his daughter PW 5 that same night that he had come across a dead person on the road. He was still looking for the mother of PW 5. It is not true that the accused used to escort his estranged wife to school and back everyday. Had that been the practice then she would have had no reason to be so fearful after him calling her.

After evaluating all this evidence I come to the conclusion that the inculpatory facts outlined herein point to the accused as the only person who could have caused the injuries on the deceased leading to his death. He had the intention to kill him because of his suspicions of an affair between the deceased and Catherine. The way he butchered the deceased shows his pre-meditated intention. He had all the time to himself to commit the crime and hide or dispose of the weapon. For my part I find the prosecution case proved against the accused beyond any reasonable doubt and proceed to convict him accordingly.

DATED, SIGNED AND DELIVERED AT EMBU THIS 8TH OF DECEMBER 2011.

**H.I. ONG’UDI
J U D G E**