



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE 41 OF 2007

REPUBLIC PROSECUTOR

VERSUS

GIBSON KIAMBI MUIANDI ACCUSED

JUDGMENT

The accused was charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particular of the offence are that the accused on 4th and 5th August 2007 at Mara Location in Meru South of the Eastern Province murdered Franklin Mugendi Kinyua. The prosecution's case against the accused was that on the night of 4th August 2007 the deceased and the accused were at a chang'aa (illicit brew) drinking place. Some of the prosecution witnesses saw the accused approach the deceased where he was seated with a group that they were drinking with. One witness said that he saw the deceased buy some chang'aa for the accused and after buying it the deceased asked the accused to go away from the group he was drinking with. The accused was seen again approach the deceased and his group and this time a quarrel ensued and the two fought. They were separated and the accused left the drinking place. As he left, he was heard threatening the deceased, "*You will see me or you will face it.*" The deceased was seen leaving about 30 minutes after the accused left. The following morning, the deceased body was found on the road. PW2 John Kirimi and PW3 Nicholas Muchiri together with another person at 7.30pm on 4th August 2007 were seated by the road side talking. The deceased came by and invited them to join him with a promise that he would buy them a drink. They went to the home of PW5 Alcanjeru Mugendi who was brewing and selling the chang'aa. PW2 said that it was dark but he noted that there were other people at the home of Mugendi when they arrived. Those people were drinking. The accused arrived after them. PW2 said that he was able to know that it was the accused because the accused went over and spoke to the deceased. PW3 recalls that

the deceased bought the accused a drink worth Kshs. 10/=. The deceased requested the accused to move away from the group he was drinking with. According to PW3, the accused did not move away and a quarrel ensued between him and the deceased. PW2 and 3 recalled that both the accused and the deceased fought using their fists. They were separated. PW3 stated that it was the deceased who started the quarrel. After they were separated, PW2 and 3 testified that the accused left the drinking place and loudly threatened the deceased. The two witnesses stated that the deceased left the drinking place less than 30 minutes after the accused. The prosecution's evidence is that the accused and the deceased would have used the same route to go home. Evidence was adduced that the accused home was first to be reached first from the drinking place and thereafter was the deceased home. PW2 and 3 said that they left the drinking place after the deceased had gone. They also used the same route as the deceased and the accused to go home. On their way home, they did not meet or see anyone. They learnt of the death of the deceased the following day. PW5 the seller of chang'aa in whose home the deceased and the accused were drinking confirmed that the accused, deceased, PW2 and 3 were drinking at his place. He recalled that they all were sitting together. According to him, they all arrived at his place at 8.30pm and left at 11pm. The accused left first and was followed by the deceased PW2 and 3 who left together later. In his evidence, PW5 said that the deceased PW2 and 3 and another person left together. He said that there was no commotion at his place when they were there. The post mortem carried out by PW6 found that the deceased died as a result of blunt head injury. He noted that the deceased bled from his nostril and the mouth. The deceased had a cut above the left eye. PW7 a police officer was on 5th August 2007 in the company of the D.C.I.O when they found the deceased body at Magutuni/Keria road. Near the deceased body, was a piece of broken tool. He observed that there was blood on the ground and the body had wounds. When this officer went to the home of the accused to question him about the murder he noted that the accused trousers had blood stains. He took away the accused trousers, shirt and jacket. He noted that the shirt had some mud. The officer noted that the accused had in his home two stools whose wood was similar to the wood found next to the deceased body. PW8 also a police officer stated that in their investigation they found that the accused previously owned three stools but after the deceased was killed he only had one stool. This officer did not disclose the source of that information and no witness was called to support the same. PW9 was a government analyst who received the accused trouser, piece of wood and blood sample of the deceased and the accused. After examining these items, he found as follows:-

"ITEMS RECEIVED

- 1. The blood sample of the suspect was found to be of group B.***

2. ***The blood sample of the deceased was found to be of group O.***
3. ***The trouser (Ex-A) was lightly stained with human blood of group O.***
4. ***The piece of wood (Ex-B) was stained with human blood whose A-B-O grouping results was inconclusive.***

SUMMARY AND OPINION

The blood stains on the trouser (EX-A) matched in group, the blood sample of the deceased. These bloodstains could have come from the deceased after injury.”

On being cross examined, the government analyst stated that it was possible that the blood stains on the accused trouser could have come from another person other than the deceased. The accused was found to have a case to answer. In his defence, he stated that on 4th August 2007 at 7pm, he went to PW5's home to take chang'aa. He found 4 other people there. He consumed one glass of chang'aa as he sat with people he found there. Later, 4 other people came, that is, the deceased, PW2 and 3 and another person. They sat down about 5 meters away from him. They requested for one gallon of chang'aa. The accused on finishing his 3 glasses of drink left. He reached home at 8.30pm. He left behind the four people who he had found there. On reaching his home, he did not get out of the house. He learnt of the death of the deceased from a lady who came to his home the following morning to buy milk. He in the company of his father went to confirm what the lady had said. Later, as he worked in his farm, he was called by PW2. When he went to him, he found him in the company of 3 policemen. They all went to the scene where the deceased body was. The police officer requested him and PW2 and 3 to load the deceased body into the police van. That was how he got the deceased blood stains on his trousers. The accused denied that the broken stool near the deceased body was his. He also denied having quarreled with the deceased and denied having threatened the deceased. He further denied having killed the deceased.

The prosecution in a criminal trial has to prove its case against the accused beyond reasonable doubt. This was well stated in the case **Thomas Patrick Gilbert Cholmondeley Vs. Republic** Criminal Appeal Case No. 116 of 2007.

“In each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Delamere whose grandson the appellant is said to be.”

Prosecution in this case did not adduce direct evidence of the accused killing of the deceased. The prosecution relied on the evidence of PW2 and 3 who alleged that the accused after the fight with the deceased verbally threatened the deceased at the house of PW5. However, the evidence of PW2 and 3 was seriously contradicted by PW5. PW5 stated that the accused left his place earlier than later PW2, 3 and the deceased and another person left together. The prosecution relied on the blood stained trousers of the accused as evidence of the accused

involvement in the killing of the deceased. It should be remembered that PW9 stated that although the blood found on the accused trousers was not the accused blood, it could however have been the blood of someone else other than the deceased. The accused explanation of having blood on his trousers was that his trouser was stained with the deceased blood as he in the company of others assisted to load the deceased body into the police car. That explanation by the accused was somehow supported by the evidence of PW3 when he stated that they were all together put into the police car where the deceased body was. Learned state counsel Mr. Kimathi argued that the accused had an obligation under the provisions of section 111 of the Evidence Act to explain how his trousers were stained with the deceased blood. I find that the accused did give that explanation and that explanation was supported by PW3. The evidence against the accused is circumstantial. The Court of Appeal in the case **Nzivo V. Republic** [2005] 1 KLR held thus:-

“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 circumstantial evidence to be sure that there are no other coexisting circumstances which would weaken or destroy the inference.”

The evidence of the prosecution against the accused is weakened as shown above. It does not show an inference of guilt of the accused. The circumstantial evidence presented to court has co-existing explanation, for example, the deceased could have met with someone else after he left the drinking place other than the accused. Further, PW2 and 3 had an opportunity to kill the deceased. In my view, the accused gave a reasonable explanation of how his trousers were stained with the deceased blood. That explanation coupled with the evidence of PW5 that the deceased left his place in the company of PW2, 3 and another person creates in my view a reasonable doubt of the guilt of the accused. That doubt leads me to find that the prosecution has failed to prove the case on the required criminal law standards. I accordingly find that the accused is not guilty of murder as charged. I acquit the accused of the charge of murder and I order the accused to be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 8th day of October 2010.

MARY KASANGO
JUDGE