



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE 24 OF 2005

REPUBLIC.....PROSECUTOR

VERSUS

SIMION CHECHE MAGERE..... ACCUSED

JUDGMENT

The accused was charged with murder contrary to section 203 as read with section 204 of the Penal Code in that on 1st December 2004, at Gokeharaka location in Kuria District, he murdered **Gisiri Gitangita**, hereinafter referred as to the “**the deceased**”.

The prosecution evidence briefly stated was that on the material day at about 6.00 p.m. **Colleta Nyamwamu, PW1**, a sister to the deceased, was collecting fire wood near their home. The deceased was looking after cattle nearby. PW1 saw the accused, who is her uncle approaching the deceased with a panga and a rungu. The accused held the deceased by the neck. PW1 asked the accused why he was doing so but she got no answer. Instead the accused chased her away. PW1 went and informed their mother, **Robi Gitagita, PW2**. PW1 and PW2 rushed to the scene. When the accused saw them approaching he ran away. They found the deceased lying down on the ground but he was still alive, though his neck was loose. PW2 raised an alarm and neighbours rushed there.

The deceased’s father, **John Gitangita Magere, PW3**, was in a nearby market. When he returned home he found many people there and the deceased lying down. They took him to Isebania hospital but he died on arrival. They returned with the body to their home. On the following day a report was made to Kehancha police station. Police officers proceeded to collect the deceased’s body and took it to Ojere memorial hospital.

A port mortem examination was done by **Dr. Aggrey Idagiza, PW5**. The doctor found a laceration on the neck at the level of cervical vertebra one and two. There was also a slight blood staining on the right side of the deceased’s eye. He also found that the cervical vertebra two had fractured and the spinal cord was lacerated. PW5 formed an opinion that the cause of death was due to the laceration of the spinal cord due to sudden jerk and extension of the neck.

The accused was arrested on 5th of March 2005 and thereafter charged with murder of the deceased.

In his defence, the accused said that on 1st December 2004 he left his home and went to Ntimaru market to buy cattle as he was a livestock trader. He spent that night at Ntimaru in the home of one Mwita Mairu. On the next day he and Mwita Mairu went to Kehancha and he sold the cow which he had

bought. He bought another cow and on the following day he took it to Maberera market. He alleged that he spent another night at the home of Mwita Nyabega. He returned home on 3rd December 2004. He was informed that his brother's son, the deceased, had died and he was the suspect. He was shocked to hear that. He denied any knowledge of the deceased's death. He added that he had a land dispute with the deceased's father who is his brother. That night the deceased's father went to his home and attacked him with a spear on his back.

The accused called one witness, **Zachariah Litoto Magere, DW2**, who is his brother. He told the court that on 1st December 2004 he went with the accused to kehancha market where the accused bought a cow. He left the accused at the market and returned home. The accused did not return home that night, DW2 added. On 3rd December 2004, DW2 got information that the accused returned home but was attacked by the deceased's father and a vigilante group known as "**sungu sungu**". He further stated that there was a land dispute between the accused and the deceased's father.

Mr. Omwega for the accused and Mr. Chirchir, state counsel, made brief submissions which I have taken into consideration.

This case was fully heard by the late Justice Kaburu Bauni but he passed away before he had delivered the judgment. It was agreed by the defence counsel and Mr. Kemo, Senior principal prosecution counsel, that I peruse the evidence on record and prepare a judgment on the basis thereof. The provisions of Section 200 and 201 of the Criminal Procedure Code were complied with.

On the evidence on record, there is unchallenged evidence that on the material day PW1 saw the accused attacking the deceased. PW1 testified that the accused held the deceased by the neck and knocked him down. She ran home and told her mother, PW2. When PW1 and PW2 proceeded to the scene, they saw the accused but the latter took off. The deceased was lying down and it was evident that his neck was loose. The evidence of these two witnesses clearly places the accused at the scene of the crime and renders worthless the defence of *alibi* that was advanced by the accused and his witness.

The cause of death was established by PW5 to have been laceration of the spinal cord due to sudden jerk and extension of the neck. That finding corroborates the evidence of PW1 that she saw the accused holding the deceased's neck and knocking him down.

The accused's defence is a sham and is hereby rejected. I am convinced that it is the accused who inflicted grievous harm to the deceased which led to his death. In so doing, the accused had malice aforethought. The land dispute that existed between him and the deceased's father may explain the accused's conduct towards the deceased. I find the accused guilty of murder as charged and convict him accordingly.

DATED, SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF MAY, 2009.

D. MUSINGA

JUDGE.

ACCUSED: The prosecution witnesses were not truthful.

D. MUSINGA

JUDGE.

COURT: The accused is sentenced to death as by law prescribed. Right of appeal within 14 days from the date hereof.

D. MUSINGA

JUDGE.