



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

**Criminal Case 11 of 2004**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DAVID MIRARA GICHURU ..... 1<sup>ST</sup> ACCUSED**

**SAMUEL NGUMI GICHURU ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

The two Accused David Mirara Gichuru and Samuel Ngumi Gichuru were jointly charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on the nights of 11<sup>th</sup> and 12<sup>th</sup> February, 2004 at Yamumbi Farm in Uasin Gishu District within Rift Valley Province jointly murdered John Kibathi Gichuru.

The Prosecution called five (5) witnesses. PW 1 Timothy Kagesia said that on the night of 11<sup>th</sup> February, 2004 at 9 p.m. the 1<sup>st</sup> Accused David Mirara came to his house with another man who he said was his brother. They exchanged some words and left. That the next morning the 1<sup>st</sup> Accused and his brother came and knocked on his door. That each had a blue bag. That they asked for a cigarette. They slept in his kitchen. That at 6 a.m. they left. PW 1 identified the 1<sup>st</sup> and 2<sup>nd</sup> Accused.

PW 2 was a brother of the two Accused and the deceased. He was called Simon Gitau Gichuru. He testified that he learnt that the deceased had died. On 12.2.04 at 6 a.m. another brother called Mbatia came and told him that the deceased had been killed and his body was in a field. He went to the field and found the body. He went to the Police Station and reported the death. The body was removed from the scene and taken to the mortuary.

PW 3 was Patrick Nganga Gicheru. He was also a brother to the deceased and the two Accused. He lived in Langas.

He testified that on 12.2.03 at 8 a.m. he was preparing to go to work. One Isaac Gitia Wanyoike arrived and said that he was needed urgently. He accompanied him to Yamumbi Estate. He was told that one of his brothers had been attacked by thugs. He went and found a body covered with a blanket. He identified the deceased as his brother called Kibathi. His neck had been cut.

He testified that his Cousin called Joseph Gakuru told him that the 1<sup>st</sup> Accused had been seen earlier in the morning with bananas in a paper bag. They went to the 1<sup>st</sup> Accused house. They found him about to

leave. He admitted that he got information of the death of the deceased. The accused was holding a bag. PW 3 asked him to open the bag but 1<sup>st</sup> Accused refused.

That they forced him to open the bag and inside found a curtain, a black trouser and black shoes. That the trouser and shoes belonged to the deceased. That 1<sup>st</sup> Accused claimed that the goods had been brought to him. PW 3 said that in the house they also saw peeled bananas as those at the murder scene.

PW 3 said that he checked the 1<sup>st</sup> Accused and found him to be wearing other clothes inside those he wore. That the trouser had blood stains.

PW 3 said that they arrested the 1<sup>st</sup> Accused and took him to Langas Police Station. That the 1<sup>st</sup> Accused was very drunk and could not account as to what happened. He told them that he was with the 2<sup>nd</sup> Accused the previous night.

PW 3 said that they went to the house of PW 2 with the Police. That they found a panga inside the house. He said that upon being asked for the clothes he wore the previous night, he produced them and they seemed to have blood. It also had some paint marks.

PW 3 identified a green trouser allegedly found with the 1<sup>st</sup> Accused. It had blood stains on the knees. That the pair of shoes he wore also had blood stains as were the socks. That the black shoes and black trouser belonged to the deceased.

PW 4 was Police Constable Paul Kipkemboi. He testified that PW 3 and a Cousin brought a pair of shoes and black jeans which they said belonged to the deceased person. He said that the 1<sup>st</sup> Accused was wearing shoes and a trouser which had bloodstains. Also that the socks were blood stained. He said that he arrested the 2<sup>nd</sup> Accused as it was alleged that he had been seen with the 1<sup>st</sup> Accused.

PW 5 was Dr. Joseph Embenzi. He produced the post-mortem report which had been carried out by Professor Koslova whose handwriting and signature he knew. He said that upon examining the body of the deceased it was found that the cause of death was cut throat with severe cut trachea and other major neck vessels leading to severe bleeding.

The 1<sup>st</sup> and 2<sup>nd</sup> Accused were placed on their defences. Each gave unsworn statement. 1<sup>st</sup> Accused said that on 12.02.04 at 8.30 a.m. he was outside brushing his teeth when a group of over 50 people approached him. He was arrested and taken to Langas Police Station where he was accused of killing the deceased. He denied about having any bag.

The 2<sup>nd</sup> Accused said that he was at his house at Race Course on 12.02.04. At 2 p.m. Police officer together with PW 3 and one Joseph Gakuru came to his house. They searched the house but found nothing. He was taken to the Station and charged with the murder.

I have considered the evidence of the prosecution witnesses and that of the two Accused. I have carefully analysed the evidence upon perusal of the proceedings. I have taken into account the submissions by Counsel.

I do find that none of the prosecution witnesses ever saw the first and second Accused together on the nights of 11<sup>th</sup> -12<sup>th</sup> January, 2004. None of the witnesses saw any of the two Accused with the deceased. None of the witnesses ever saw any of the Accused attack, injure or harm the deceased.

The only evidence against the 1<sup>st</sup> Accused is that he was found in blood soaked clothes, shoes and socks. Also that the deceased clothes and shoes were found with the 1<sup>st</sup> Accused. The evidence of PW 3 was never corroborated by any witness. The alleged other witness Joseph Gakuru, a Cousin of the deceased was never called as a witness during the trial. PW 3 claimed that he was together with the said Joseph Gakuru at the time of the arrest at recovery of the deceased clothes and shoes.

The evidence of PW 3 was uncorroborated. The 1<sup>st</sup> Accused was not arrested by the Police but by the PW 3 and others not called. 1<sup>st</sup> Accused spoke about some previous grudge between PW 3 and himself. It appears that PW 3 and the said Joseph Gakuru had been charged with robbery against his employer.

I think that it is unsafe in the circumstances to accept the evidence of PW 3 without corroboration. This is particularly so since no explanation was given as to the failure to call Joseph Gakuru as a witness in this trial. The circumstantial evidence is weak and unreliable. The prosecution did not prove that the blood on the clothes and shoes of the 1<sup>st</sup> Accused belonged to the deceased. There was no examination and analysis of the blood on the clothes and stains. The prosecution were obliged to prove that the clothes and shoes belonged to the deceased and the blood on the 1<sup>st</sup> Accused's clothes were that of the deceased.

The 2<sup>nd</sup> Accused was arrested at his house merely on suspicion of having been with the 1<sup>st</sup> Accused the previous night. No eye witness led any evidence of his involvement in the death or murder of the deceased. Nothing was found on him in connection with the deceased. The prosecution do not explain at all why he was arrested or charged.

No weapon was found on the 1<sup>st</sup> and 2<sup>nd</sup> Accused which was used in the murder. There is no proof to prove that the deceased died as a result of being injured or attacked by any of the Accused.

The evidence by the prosecution was weak, inconsistent and uncorroborated. The prosecution did not also prove any malice aforethought. No malice or motive was established.

In all, I find the prosecution evidence wanting and hold that there is no evidence beyond any reasonable doubt that any of the Accused killed the deceased. The investigations carried here was below the required standard and quite questionable. It is almost as though the police were pushed by PW 3 to prosecute the Accused persons. He is the one who on his own caused the arrest of the 1<sup>st</sup> Accused, collected the alleged evidence and took it to the police and suggested that the 2<sup>nd</sup> Accused was involved. The Police abdicated in their investigative duties and allowed to be manipulated by a civilian who may have had his own agenda. The Accused are not guilty.

In the premises, I do hereby acquit both Accused persons of the charge of murder under the provisions of S. 322 of the Criminal Procedure Code and any other law applicable.

I hereby order that the two Accused persons be released from Prison custody forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET ON THIS 26<sup>TH</sup> DAY OF JUNE, 2009.

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:**

Mr. Chirchir for Mr. Omutelema for the State

Mr. Okara for the Accused.

Accused