



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 64 of 2008**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**RASESH CHHOTALLAH SHAH..... ACCUSED**

**JUDGMENT**

The accused faces two counts of Murder contrary to section 203 as read with section 204 of the Penal Code. In the first count it is alleged that on the 5<sup>th</sup> day of July, 2008 at Gitathuru Gardens of Nairobi West District of Nairobi Province with others not before court murdered **CHHOTALLAH SHAH**. In the second count it is alleged that on the 5<sup>th</sup> day of July, 2008 at Gitathuru Gardens of Nairobi West District of Nairobi Province, with others not before court murdered **HEMLATTA SHAH**.

This case was partly heard by Hon. Apondi J. He heard three witnesses. After my brother's transfer from this division, the accused person, under the counsel of his advocate, elected to have this case proceed from where it was left off by Hon. Apondi J. The accused was exercising his rights under section 200 of the CPC. In light of that election, I proceeded to hear and conclude the case.

The facts of the case are that the deceased persons, Chhotallah Shah and Hemlatta Shah, were husband and wife respectively. The man was the father of the accused person, while the deceased woman was a stepmother of the accused. On the night of 5<sup>th</sup> July, 2008, the two deceased persons were found murdered at their home, with deep cut wounds on their heads, necks and other parts of the body. The prosecution called evidence to show that the cause of the death of Chhotallah was severe hemorrhage following sharp object injury to head and neck; the cause of death for Hemlatta was head injury due to sharp object trauma.

The prosecution called three workers at the compound and home of the deceased. PW2 was Josphat Lusenzi, the house servant for 7 years preceding the incident. His work was cleaning and keeping the house. His evidence was that Chhotalal, the deceased man, left the house at 8.00 a.m. on the morning of 5<sup>th</sup> July, 2008. He returned at around 5.00pm and did not leave the house again. Josphat testified that Hemlatta also left the home that morning but at around 10.00am and only returned at around 2.30p.m. Josphat testified that he completed his work that day at around 1.00pm and retired to his quarters within the compound. Josphat testified that the accused used to live with his parents and that on the material day he personally saw him leaving in the morning. What Josphat learnt about the movements of the accused into and out of the compound thereafter was witnessed by the night guard who also testified, as PW3, one Stephen Otieno Opondo, and the gardener Absalom Mundia, who was PW4. Josphat testified that at 8 pm he heard the accused vehicle enter and at 9 pm leave the compound.

Absalom had worked for the deceased family for 8 years before the incident. He worked as gardener within their compound. Since he worked outside the house, Absalom testified that he witnessed the movements of members of the deceased family between 8 am when he reported to work, and 4.20 pm when he reported off. The only variation between his evidence and that of Josphat which is worthy of mention, was his evidence of the visit to the home by Hemlatta's mother. Absalom testified that Hemlatta's mother was driven to the home by her driver at around 11 am. He testified that she then went with her daughter, Hemlatta, in her car and that both did not return until 12.30 pm. Upon their return, Absalom testified that the granny was driven away by her driver leaving her daughter Hemlatta, behind.

The evidence of Stephen, the night guard, was that he had worked in the home for 7 years. Stephen testified that he had been seconded to the home by MASS SECURITY his employers. Stephen stated that he reported on duty between 6 and 6.30 pm on 5<sup>th</sup> July 2008. He said that Josphat was waiting for him at the gate as was the custom. Josphat opened for him and gave him the gate keys. He stated that he changed into his uniform and started patrolling within the compound. It was Stephen's testimony that at 8 pm, the accused went to the home accompanied by two African men. Stephen testified that he was concerned about the accused's accompaniment into the home at night by the two African men and that as a result of that concern he went to Josphat's quarters and informed him. He said that he took no action when Josphat said that it was not unusual for the accused to take his workers home.

Stephen stated that the three, that is the accused and the 2 men, stayed at the house for between 15 to 30 minutes, before driving away with his guests. Stephen said that between 9.30 pm and 10 pm same night, the accused drove home with his estranged wife, and that shortly after they entered the house, the wife went out to inform him to check in the house. That, upon entering the sitting room he stepped on human fingers. He realized later that the fingers had been chopped off Hemlatta's hand and that Hemlatta lay dead in a pool of blood.

The accused was placed on his defence and his evidence, by way of an unsworn statement, was to the effect of denying the offence. The accused narrated how he had spent the day and early part of the evening of the material day. He stated that that morning he had visited his father at his shop up to 11 am. It was his evidence that he later proceeded to Mary's Club Westlands, where he sat chatting with his friends and playing cards between 12 noon and 7 pm. He testified that at 7 pm he left the club and proceeded to pick his estranged wife from the parents' house. He took the wife to Liza Apartments, a Chinese Restaurant where they arrived at quarter to eight. The accused testified that he sat with his wife nibbling rather than having supper up to 9.15 or 9.20 pm when he claims a feeling that something bad had happened overwhelmed him. That after a call to his father's mobile phone and the home landline went unanswered, he decided that they both proceed to his home at 9.30 pm which they did.

That on arrival at home he found both parents lying dead in separate rooms, and some household electrical gadgets having been moved around the house. That is when they called police.

I have carefully considered the evidence adduced by the prosecution as well as the defence. I have also carefully considered submissions by both counsel.

The evidential burden is upon the prosecution to prove its case beyond any reasonable doubt. The Court of Appeal for Eastern

Africa, in the celebrated case of **OKALE VS. REP 1965 EA 555** held:

**“In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches;**

**(repeating the principles set out in NDEGE MARAGWA VS. REP (10)), the burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as a whole.”**

The issues which emerge from this case are very clear indeed. I will consider them as raised by the counsels. Mr. Amendi for the accused submitted that the time of death is unknown. Counsel submitted that Dr. Wasike, who conducted the post mortem into the death of the deceased persons failed to state the age of the fatal wounds. Miss Mwanza for the state did not make any submission in regard to this issue. On this point I do find that the evidence adduced by the prosecution is very clear as to the time the deceased were last seen alive and when they may have met their death. From the evidence of Absalom who was a gardener and therefore worked outside the compound, he first opened the gate for Hemlatta at 2.30 pm, when she returned with the mother. She never left the compound after that. Absalom also opened the gates for Chhotalal at 4 pm, and he too did not leave the house again. Josphat, PW2, was the one left manning the gate between 4.20 pm when Absalom left, and between 6 to 6.30 pm when Stephen reported on duty. On his part, Stephen testified that the accused and his estranged wife informed him of the death of the deceased at around 10pm that

night. The time of death can safely be placed between 4.20 pm and 10 pm.

I have considered the other evidence. There was the evidence from Josphat that the accused was not friendly to his father. Mr Amendi for the accused submitted that Josphat's evidence that the accused and his father were not getting along was contradicted by the other servants that is Josphat and Absalom. Mr Amendi also submitted that Josphat's evidence should not be believed because he did not give the reason why the accused person and his parents had quarreled.

Miss Mwanza for the State submitted that Josphat had explained why the accused person and his parents were not getting along also submitted that the reason for the quarrel was because the accused person had married a woman whom the parents did not approve of. I have gone through the proceedings. Nowhere in the evidence of Josphat is any explanation given for the quarrel or disagreement between the accused person and his father or parents. I do not know where counsel for the State got that evidence from.

In regard to Josphat's testimony concerning the relationship between the accused person and his parents, the accused claimed that he got along very well with his father. I have considered Mr. Amendi's submission that Josphat's evidence was not corroborated. It is my view that Josphat was in a better position of knowing the relationship between the family members since he worked inside the house and also lived within the compound. Josphat therefore had more contact with the deceased family members than either Stephen or Absalom could have had. I did not consider the testimony of Absalom and Stephen that they had not witnessed any disagreement between the family members, a contradiction to Josphat's evidence. I considered the fact that these two servants were based outside the house throughout the period they worked for the deceased family. In addition, Stephen worked at night and from his testimony it was very clear that he had minimal contact with the family members. For these reasons I do not agree with Mr. Amendi for the accused that there could not have been a disagreement between the accused person and the deceased. I find no reason to disbelieve the evidence of Josphat in that regard.

The other issue which I wish to consider is regarding the kind of a fence that surrounded the home of the deceased. Mr. Amendi for the accused person submitted that the evidence of the investigating officer Inspector Mugunda who was PW7 that the deceased premises were surrounded by a stone wall did not receive any corroboration from any other witness. It was Mr. Amendi's submission that the gardener, Absalom and all other witnesses contradicted Inspector Mugunda's evidence when they stated that the compound had a fence made of barbed wire and Kai Apple.

Miss Mwanza for the States submitted that the evidence of PW2 was that the compound had two fences the first one was an inner fence which was a live hedge and the outer was stone wall. Miss Mwanza submitted that the testimony of PW2 corroborated that of PW7 the investigating officer.

I have carefully considered the evidence on record and I find that the evidence of the investigating officer, Inspector Mugunda that there was a stone wall around the compound of the deceased home did not receive any corroboration from the watchman Stephen, the house servant, Josphat and the gardener Absalom. Stephen, Josphat and Absalom were consistent that the outer fence surrounding the compound was made of Kai Apple and Wire Mesh. I will deal with this point a little later.

Mr. Amendi for the accused has urged the court to find that the investigating officer of this case, Inspector Mugunda carried out shoddy investigations into the case. The basis for this strong accusation was also given by the counsel. Learned counsel for the accused submitted that Inspector Mugunda omitted to have the scene of the crime dusted, that he never checked the accused person's vehicle for forensic evidence, that he made no effort to recover the murder weapon and finally that he never investigated the idea that the murderers could have come from outside the compound.

Miss Mwanza learned counsel for the State did not agree with the defence. Miss Mwanza submitted that the prosecution had discharged its burden and had proved its case against the accused person. Miss Mwanza urged the court to take into consideration the explanation by Inspector Mugunda that he was assigned the case one day after the incident and that therefore he could not have been able to carry out the kind of investigations Mr. Amendi complained of.

In regard to the investigations carried out in the case I do agree partly with the submissions by Mr. Amendi that the investigations carried out into this case were not up to spot. No dusting was carried out yet there was evidence that the scene of crime personnel who normally carried out such forensic examinations visited the scene on the night in question. The need to carry out dusting must have been very obvious to the police officers who visited the scene because of the movement of electrical gadgets and furniture around the house. The movement was so obvious that the scene of crime officer who took the photographs of the scene, PC Omolo Owino, captured some of them in his photographs. For instance Photograph No. 13 captured a dining chair in the sitting room area obviously out of place. Photograph No. 14 captured an empty space in a wall unit, with wires hanging where electrical gadgets must have been removed. Photograph No. 15 captured a hi-fi music system lying clumsily on the floor and one speaker resting on the dining table. Photograph No. 16 was for a flat screen TV on the floor of the kitchen.

It should have been very obvious to the police officers that all these gadgets ought to have been dusted for finger prints and that if any finger prints were found on those items, it could have assisted greatly in the investigations into the case. I do not however blame inspector Mugunda for this omission since he was instructed to take over investigations of the case one day after the incident and therefore obviously by the time he took over investigations the scene had been interfered with. The same applies to the omission to carry out forensic examination on the accused's vehicle. The omission is however not fatal to the prosecution case.

Having stated the above, I must state that I was not impressed by Inspector's Mugunda's description of the fence in the compound of the deceased. He is the only witness who claimed that there was a stone wall around the compound which all the other witnesses especially Stephen, Josphat and Absalom, who had worked in that compound for over 7 years, were very clear that the only fence around the compound was made of wire mesh and kai apple live fence. The impression I got is that Inspector Mugunda never actually visited the fence and if he did so he was seeing his own things. Regarding the fence the three witnesses were the only ones who could be believed.

The evidence against the accused person is both direct and circumstantial. The direct evidence is to the effect that the accused went home between 8pm and 9pm on the material night. It is the prosecution case that since the deaths were discovered at around 9.30pm or so, when the accused went home the second time, he must have been involved in the murder the first time. I will now consider what the circumstances of the case are and what in this case the State regards to be in its favour. The Court of Appeal in **KARIUKI KARANJA VS REP [1986] KLR 190** stated as follows regarding circumstantial evidence:

**“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The burden of proving facts justifying the drawing of that inference is on the prosecution.”**

That statement is in line with the holding on the same point in the celebrated case of **REX VS KIPKERER ARAP KOSKE [1949] 16 EACA 135.**

The prosecution has the burden to adduce evidence which could justify the inference of guilt on the basis of circumstantial evidence. The prosecution has called three key witnesses, Josphat PW2, Stephen PW3 and Absalom PW4. These were the house help, the night guard and the gardener, respectively. The evidence of Absalom is that he left both the deceased alive at the time he reported off duty at 4.20 pm on the material day. The evidence of Stephen was to the effect that the accused person went to the home twice that evening. The first time he went, he was in the company of two African men, one of whom was carrying a paper bag. Stephen testified that the accused and his group left the premises after 15 to 30 minutes. The second time he came was between 9.30 and 10 pm and that this time he was accompanied by his estranged wife. It is the former wife who called Stephen from the gate to go and see the body of Hemlatta which was lying dead in the sitting room.

The issue is whether the circumstantial evidence adduced by the prosecution points irresistibly to the guilt of the accused person and whether the inculpatory facts are incompatible with the innocence of the accused. If the evidence of Stephen is to be believed, it could mean that it is during the accused person's visit to his parents home that night that the

deceased persons were fatally attacked. Stephen's evidence was taken by Hon. Apondi J. as I had stated earlier. I had no opportunity to examine this witness and assess his demeanor. I have however considered the evidence of other witnesses, as is the duty of the court, in order to test the consistency of Stephen's evidence.

Stephen testified that immediately the accused person came home at around 8 pm accompanied by two African men, he became suspicious or concerned. This prompted him to go to Josphat's quarters to report to him what he had seen and to pick his brain. Stephen's evidence was corroborated by Josphat. It was Josphat's testimony that Stephen went to him at around 8 pm on the night in question and informed him that the accused person had come home with two African men and that he, Josphat, had dismissed Stephen's concern because it was not unusual for the accused person to go home with his workers. Josphat testified that he assumed the two Africans were accused workers.

The first police officers to visit the scene of the incident included PW5, P.C. Kibore. P.C. Kibore told the court that upon receiving the information from the OCS Spring Valley Police Station, to proceed to the scene they went there immediately. P.C. Kibore testified that while at the scene, after seeing the bodies of the deceased, they enquired whether there was any watchman for the compound. The witness stated that one Mr. Opondo, Stephen PW3, was identified to him as the person who had been on duty as the watchman that night. It was the evidence of P.C. Kibore that after questioning him, Stephen informed them that he had opened the gate for the accused person at around 8 pm that night and that the accused had been accompanied by two African men one of whom was carrying a paper bag.

I find that the evidence of Stephen that the accused person had come home that night at around 8 pm, while in the company of two African men, was not an afterthought. Stephen had reported this fact to Josphat and later to the police officers who visited the scene immediately after the incident, when Stephen had the first opportunity to do so. I also find the evidence of Stephen that the accused person had come at around 8 pm that night, received corroboration from the evidence of Josphat. It was Josphat's testimony that he knew the sound made by the accused's new vehicle and that he had heard the accused person's vehicle being driven into the compound at around 8 pm and also heard it being driven away at around 9 pm.

The accused person in his evidence neither admitted nor denied going to his parents' home any time between 8 and 9 pm on the material night. In fact it was his testimony that after leaving that morning, he only went back home after 9.30 pm to find his parents dead.

The evidence is that of the accused person as against that of Stephen, PW 3 as corroborated by the evidence of Josphat PW2. The question is why Stephen and Josphat would, being servants at the accused parents' home, implicate the accused person falsely with such a serious offence. I noted that the accused person did not say any word against these two witnesses. He did not allege that there was any grudge between him and them, neither did he make any claim

whatsoever that these two witnesses had not told the truth. I find that quite telling. I also found it rather curious that the accused person did not specifically deny having gone home between 8 and 9 pm on the material night. I do warn myself however that the burden of proof lies with the prosecution throughout the case and that it should not shift to the defence at any one time. The accused had no obligation to prove his innocence.

I weighed the evidence of Stephen and Josphat. I have already stated that Stephen was consistent in his evidence from the first opportunity that he had, that the accused person had gone home with two strangers, before later going with his wife to announce the death of the deceased persons. I also considered the fact that there was no break in into the house and neither was there any report of any theft from the house. It had been said, and this is not disputed by both the prosecution and the defence, that there was a set of keys for the house which had reportedly gone missing. That pair of keys belonged to the estranged wife of the accused person. She was not called as a witness to explain this and other issues in the case. Miss Mwanza for the State in her submissions implied that she may have been an accomplice.

I do not find any evidence to suggest that either Josphat or Stephen or both of them could have committed this offence. Their conduct throughout the material time was consistent with that of innocence. They were found at their place of work performing their duty. None of them made any attempt to escape from the scene. They had worked for many years for the couple giving the impression they were loyal and that the deceased couple were happy with their performance. The fact there is no evidence of theft or of a grudge between them and the deceased; the fact their evidence was consistent throughout the time of the investigations into the case up to the time they testified in court; all these facts point to the innocence of these two witnesses.

Regarding the wife of the accused person, under the principle of compellable witnesses, the prosecution could not have called her to testify in a case against her husband. Only the accused could have called her as a witness seeing that she was not the complainant in this case.

I considered that the accused person put forward an alibi in his defence. He stated that he had spent the evening between 7 pm and 9.30 pm with his estranged wife. In the Court of Appeal case of **KARANJA VS. REP 1983 KLR 501** the court held as follows:

**“The word “alibi” is a Latin verb meaning “elsewhere” or “at another place”. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant’s story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged.**

**In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his**

**defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.”**

The accused person put forward the alibi for the first time in his defence in passing. He did not call as a witness the person with whom he claims he had spent the evening, even though the accused person was under no obligation to call any witness. The accused person was represented by counsel throughout the trial and he never put forward his alibi at the earliest convenience, that is at the time of plea or soon thereafter, until at the stage of the defence. It can safely be found that the alibi was clearly an afterthought. I dismiss it as such.

I find that the evidence of Stephen, as supported in material particular by the evidence of Josphat, that the accused went home between 8 pm and 9 pm on the material time, must be true.

I have already stated why I believe the evidence of these two witnesses. It also means that the parents were alive at the time the accused person visited the home with the two African men, otherwise nothing could have prevented the accused from noticing their bodies, considering Hemlatta's body was just in the sitting room, and taking an appropriate action. That being the case, the accused person could have raised the issue at 8 pm and not later when he went back with his estranged wife.

I find that the evidence of the prosecution proved accused person had all the time and opportunity to commit the offence and that he did it with others who were not found. I also find that the prosecution has adduced sufficient evidence to establish that the accused had formed the necessary mens rea and actus reus to commit this offence. The accused collected two men. Took them home, aggressively attacked the deceased, and drove away leaving them for the dead. The act of getting two men with whom he executed the attack is evidence of mens rea. The act of taking the two men home to assist in carrying out the attack completes the actus reus, and is proof that even if the accused did not himself lift as much as a finger against his parents, he was a principle offender to the crime.

After carefully considering the evidence on record, I find that there is strong circumstantial evidence which irresistibly points to the accused person. The accused person arrived home with two men with whom he entered his parents' house. The three of them spent 15 to 30 minutes before leaving. The accused went back less than half an hour later in company of his estranged wife only to announce the death of the deceased persons. Between 5 pm, when Chhotalal went home and 10 pm when the bodies of the deceased were discovered, the evidence is clear that there had been no break in and that no other persons had been to the home except the accused person and his company. The issue of the lost key is immaterial in light of the strong circumstantial evidence adduced by the prosecution in this case.

I find that the inculpatory facts are incompatible with the innocence of the prosecution and incapable of

explanation upon any other reasonable hypothesis than that of his guilt.

In conclusion, I am satisfied that the accused has discharged its burden of proof to the required standard and that the prosecution has proved its case against the accused person beyond any reasonable doubt. I therefore reject the accused person's defence, find the accused person guilty of the two charges of murder against him and convict him accordingly.

**Dated at Nairobi this 6<sup>th</sup> day of November, 2009.**

**LESIT  
JUDGE**

**Read, signed and delivered in the presence of**

Elisha	court clerk
Accused present	present
Mr. Gitonga h/b for Miss Mwanza	for the State
Mr. Swaka h/b for Mr. Amendi	for the accused

**LESIT  
JUDGE**