



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Case 29 of 2006

CRIMINAL LAW

- * How the court should deal with
circumstantial evidence.
- * Is suspicion sufficient to prove a
case against an accused.

REPUBLIC.....PROSECUTOR

Versus

FRANCIS IRUNGU NDEROACCUSED

RULING

The accused is charged with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars of that offence were that on the 15th day of February 1998 at Geitwa village in Muranga District of Central Province jointly with another not before court murdered **BENSON KAMARA MBUI**. At the close of the prosecution's case the accused's counsel submitted that the prosecution had failed to prove a case on the required criminal standard sufficient to put the accused to his defence. The state in response relied on the evidence on record. The evidence presented by the prosecution was started by Gladys Wairimu Kamara. She was the wife of the deceased. She recalled that on Saturday, 14th February 1998 at about 6 p.m. the sons of Ndero came to her husband at their home and told him that there was a cow available for purchase. They explained that their family wanted to sell the cow to assist a son who had been arrested. This witness explained that that Ndero's home is close to her home. That she knew the sons of Ndero very well since they had gone to the same school with her children. Her deceased husband did not go the home of Ndero on that day but did go on 15th February 1998 at 8.00 a.m. He informed this witness that he was going to the family of Ndero to buy a cow. He had on him Kshs.40,000. The deceased husband failed to return home which caused this witness to go to the home of Ndero. She did not find the sons of Ndero who had come to her home the previous day that is, Irungu and Mwaniki. She asked the mother of Irungu and Mwaniki at that homestead whether her husband had been there and the mother reported that when he came he did not find those that they were selling the cow. She however said that she was concerned about her deceased husband absence because it was not usual for him to stay out on a Sunday. At about 6 p.m. she went looking for her brother in law but only found his wife namely Jane Wambui. Together they went to the home of someone called Gatoto. Gatoto used to conduct business with her deceased husband. They also did eventually meet up

with their brother-in-law Njeru. The four of them went to the home of Ndero to look for the deceased. They did not find him but because it was late they decided to return to their home. The following day around 8 a.m. they reported to the assistant chief about the disappearance of the deceased. The assistant chief went with them to the home of Ndero. Again on asking the wife of Ndero where her husband was they did not receive a positive answer. They however began to search the compound and they noted some dragging marks on the ground. These marks were from one of the houses and led to the pit of the borehole. The distance between the home and the borehole was about 200 metres. Before reaching the borehole they saw her husband's shoe. On following the draggings they found her husband's body thrown into the pit. The body had been tied with a sack. On being cross examined this witness stated that the Ndero family had seven sons. She confirmed that she knew their home very well and that in that homestead there were three houses. Subsequent to the finding of the deceased body the houses and everything in the compound including plants and cows were destroyed by the mob in the village. This witness finally confirmed to the accused counsel that she did not see the accused kill the deceased.

P.W. 2 was the Assistant Chief of Geitwa village. He said on 16th February 1998 at approximately 9.30 am three people came to him namely Gladys wairimu, Joseph Njeru Mbui and Norman Gatoto Njeru. They informed him that the deceased had disappeared from Sunday, previous day. They made some inquiries in the shopping centre but no one had seen the deceased. They went together to the homestead of Ndero. The mother of Ndero did not know where her sons were. They began to look around the compound because as he said this family was notorious for bad conduct. He noticed some marking which was coming from the small house used by men in that homestead. They followed that marking and as they followed they saw a shoe which they described as a traditional shoe "akala". PW 1 on seeing the shoe screamed. This witness together with the deceased brother in law and Gatoto went to the pit. There they found the deceased body thrown inside the pit. The body was in a sack. Together with the body they found the deceased bible. The borehole was cemented and it had water. This witness reported the matter to the Muranga Police station. On cross examination he said that the Ndero family had more than five sons. At the homestead of Ndero there were two houses. One of those houses was smaller and he concluded that it belonged to the sons. He described the deceased as a businessman who was involved in buying and selling of cows. He also said that he was a preacher. In the Ndero homestead he confirmed that there were cows. However after the body was discovered at the borehole the villagers destroyed the houses, burnt the coffee bushes and even slashed the cows to death. He said that the Ndero family had a bad behaviour and the people surrounding that home complained that the Ndero family often stole their chicken.

P.W. 3 was the brother of the deceased. He confirmed what PW 1 said that he was informed by her of the disappearance of the deceased. He also confirmed that on 15th February 1998 they went to the home of Ndero and the wife of Ndero said that she had not seen the buyer or the seller of the cow. He also confirmed that on 16th February 1998 they reported the disappearance of the deceased to the assistant chief. Together with the assistant chief they went to the home of Ndero where they discovered the dragging marks and eventually found the body of the deceased in the pit. He confirmed on cross examination that in the Ndero homestead there are two houses. That he saw blood in the small house although he did not enter. There was blood in a tin and also on the stool. The police later carried away these items.

P.W. 4 was Hesbon Maina Gicheru. He also confirmed how they looked for the deceased at the homestead of Ndero. He also gave evidence of how they discovered the body of the deceased which was consistent with the previous witnesses. He identified the body of the deceased and he noted that it had a cut on the left side of the head, on the forehead and on the left hand. This witness also confirmed that the homestead of Ndero has two houses. Inside the smaller house he saw a plate which had blood, a black shoe, timber and a shirt which were blood stained. He also confirmed that that homestead of Ndero was destroyed subsequently by the villagers. The postmortem report was presented to court by P.W. 5. The doctor who presented the report said that there was a deep cut on the left part of the head in the temple area. There was also another cut above the left ear, the left back of the head and part of the ear robe had been severed. The skull had a fracture on the temple left side which extended to the back. The cause of death was as a result of cardio arrest with severe head injuries from blood trauma. The prosecution also called a witness from the Government Chemist who confirmed that items collected from

the small house in the Ndero's homestead had the blood group of the deceased. The prosecution finally did call the evidence of the police officer who investigated the case and who arrested the accused. It should be noted that the accused after the incident together with his family members moved away from Geitwa village. The accused was finally arrested in the Karatina area where he was working on 23rd February 2006.

As it can be clearly seen the evidence relied by the prosecution does not point directly at the accused as the one who committed the crime the subject of this case. Evidence clearly came out that the accused went to the home of the deceased in the company of his other brother on 14th February 1998. They informed the deceased that their family was selling a cow. The following day the deceased informed P.W. 1 that he was going to buy the cow from Ndero's home and he left having with him Kshs.40,000. There is no evidence that the deceased indeed went to the home of Ndero. There is also no direct evidence that if he indeed did go to the home of Ndero that he had contact with the accused. The evidence presented before court by the prosecution is merely circumstantial evidence. The test to be applied in cases dependent upon circumstantial evidence before inferring guilt have been stated in various decided cases. In **REPUBLIC vs TAYLOR WEAVER & DONOVAN (1928) 21 Cr. App. R. 20** the principle as regards the application of circumstantial evidence was enunciated as follows:-

“Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial.”

Coming nearer home we have the celebrated case of **REX vs KIPKERING ARAP KOSKE & ANOTHER (1949) 16 E.A.C.A. 135 at P. 136** in which the Court of Appeal for Eastern African stated:

“As stated in Wills on ‘Circumstantial Evidence’ 6th edition P 311 ‘In order to justify the inference of guilt, the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

It should however be pointed out that circumstantial evidence must always be carefully examined in order to eliminate any possibility of error. As was said by Lord Normand in **TEPER vs R (1952) A.C.** at page 489.

“Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference”.

Also in the case of **KARIUKI KARANJA vs REPUBLIC (1986) KLR** the court held:-

“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”

It is clear that the evidence present before court by the prosecution is not one on which a reasonable tribunal properly directing itself to the evidence and the law could convict. The prosecution's case is tantamount to being one which shows a suspicion that the accused either committed or was involved in the murder of the deceased. The court of appeal had an opportunity to consider a case where the prosecution evidence relied on suspicion. This is the case of **JOAN CHEBICHII SAWE vs REPUBLIC Cri. Appeal No. 2 of 2002** (unreported) the court stated as follows:-

“The suspicion may be strong but this is a game with clear and settled rule of engagement. The prosecution must prove the case against the accused beyond reasonable doubt. As this court made clear in the case of MARY WANJIKU GICHIRA vs REPUBLIC (CRIMINAL APPEAL NO. 17 OF

1998 (unreported), suspicions however strong cannot provide a basis for inferring guilt which must be proved by evidence.”

The court's finding therefore is that the prosecution by the evidence adduced before court has failed to meet the required criminal standard of beyond reasonable doubt. Accordingly having made that finding, I find that there is no case established which can lead the court to put the accused to defence. I find the accused not guilty and acquit him under **Section 306(1)** of the Criminal Procedure Code. The accused shall be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 7TH DAY OF APRIL 2008.

MARY KASANGO

JUDGE