



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

Criminal Case 14 of 2005

REPUBLIC.....PROSECUTOR

VERSUS

MARY NYAGUTHIE KURIA.....1ST ACCUSED

WILSON WACHIRA GATHEE.....2ND ACCUSED

JUDGMENT

The accused, Mary Nyaguthie Kuria (*hereinafter referred to as the 1st accused*) and Wilson Wachira Gathee (*hereinafter referred to as the 2nd accused*) were charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on 30th January, 2005 at Suswa area in Nakuru District, the accused persons jointly murdered Moses Muchiri Kibara (*hereinafter referred to as the deceased*). When the accused persons were arraigned before court, they pleaded not guilty to the charge. The prosecution called eight witnesses in its bid to prove the charge of murder against the accused persons. After the close of the prosecution's case, the accused persons were put to their defence. The 1st accused gave sworn evidence in her defence. She denied that she had anything to do with the death of the deceased. The 2nd accused opted to say nothing in his defence. After the close of both the prosecutions and the defence case, submissions were made by Mr. Mutonyi, learned counsel for the accused urging this court to find that the prosecution had not proved its case to the required standard of the law. On the other hand, Mr. Mugambi, learned state counsel submitted that the prosecution had proved its case and therefore this court ought to convict the accused persons as charged.

I will revert back to the closing submissions made after setting out the facts of this case as narrated by the prosecution witnesses. PW2 Charles Wangombe Murage was a friend to the deceased. PW2 and the deceased occasionally used to go on drinking sprees. They used to drink traditional liquors known as "busaa" and "changaa." On the 30th January, 2005, PW2 and the deceased drunk and busaa and changaa at various homesteads within Suswa area of Subukia, Nakuru District. From the testimony of PW2, they took traditional liquor from morning up to about 5.00 p.m. when they were informed that by a sister of the deceased called Wamaitha that her son (*i.e. Wamaitha's*) had been arrested by members of the anti-stock theft unit. PW2 knew one of the police officers based at the anti-stock theft unit camp at Suswa. He volunteered to go the camp and make inquiries as to why the said son of Wamaitha was arrested. According to PW2, the deceased accompanied him to the camp. However, PW2 realised that the deceased was very drunk. When they reached near the gate of the camp, PW2 told the deceased to wait for him at the gate while he made inquiries at the camp.

PW2 went alone to the camp and met PW6 PC Nicodemus Wambua and PW7 PC Jacob Mureithi. PC Jacob Mureithi was a friend to PW2. On making inquiries, he was informed that the son of Wamaitha called Waigwa had been arrested and detained at the camp on suspicion that he had stolen barbed wire

from one Kienjeku. After obtaining the said information, PW2 walked out of the camp with PW6 and PW7. The three of them found the deceased outside the camp. PW7 offered to buy PW2 changaa from the homestead of the 1st accused. They then went to the homestead of the 1st accused. PW7 bought changaa for PW2 and his colleague PW6. However, he was advised not to buy changaa for the deceased because the deceased appeared to be too drunk. The deceased however insisted that he should be bought changaa. Eventually he was bought one cup of changaa.

The group drank the liquor at the homestead of the 1st accused up to about 8.00 p.m. In the course of the evening, the deceased became too drunk until PW2 instructed the 1st accused not to sell him any more alcohol. The deceased was not amused when the 1st accused refused to sell him changaa. An altercation ensued between the 1st accused and the deceased. According to PW4 Samuel Muture Mukuru, the deceased quarrelled with the 1st accused because the deceased claimed that the 1st accused was holding his change. However, the issue was resolved and the deceased and PW2 left the homestead of the 1st accused. PW6 and PW7 parted company with the accused and the deceased. According to PW2, at that time he and the deceased were very drunk. The deceased was however more drunk than PW2. The deceased walked with difficulty and while they were walking towards the direction of their homes fell down severally to the ground. It is apparent that because of their drunkenness, PW2 and the deceased lost direction to their home. At about 9.00 p.m., they entered into the compound of PW3 Stephen Maitho Warui. PW3 was asleep at the time. They were shouting and generally making noise. PW3 woke up and told them to go away. PW2 requested him to escort them to the road leading to their home. PW3 obliged and escorted the two drunkards to the road leading to their home. He then left them on the said road.

According to PW2, while they were walking towards the direction of their home, the deceased was overcome by the alcohol and was unable to walk. PW2 stated that his efforts to assist the deceased were thwarted because the deceased kept falling down on the road. PW2 made the decision to abandon the deceased by the road side and go to his home to seek assistance. PW2 went to the home of the deceased and found his wife PW1 Alice Kabura Muchiri. He requested PW1 to get him somebody so that he could go back and fetch the deceased. PW1 instructed her son called John Kahura to accompany PW2 to the scene where the deceased had been left lying on the ground. PW2 and the said John Kahura were not able to find the deceased at the scene. They only found his jacket and his cap. After searching for him within the vicinity of the area, and being unable to find him, they abandoned the search and went back home. They slept until the following day. Meanwhile, during the night, PW3 while sleeping in his house heard the deceased wandering about the path outside his homestead. The deceased was making drunken noise. PW3 made the decision to ignore him.

On the following day, the 31st January 2005, the deceased was found lying dead under a tree near the public road leading to the homestead of the 1st accused. Apart from the fact that he was bleeding from his nose and mouth, there were no other visible injuries seen by the people who found him. The police at the anti-stock theft unit camp were duly informed. They in turn informed Subukia police station. PW5 PC David Meli accompanied Sergeant Juma to the scene of crime. PW5 drew a sketch plan of the area. The sketch was produced as *prosecution's exhibit No.1*. He collected the body of the deceased and took it to Nyahururu District Hospital mortuary where post-mortem was performed by PW8 Dr. John Weru.

According to Dr. Weru, he observed that the deceased had sustained bruises on his right and left upper limbs. He also had bruises on the left wrist joint and on the right shoulder. On internal examination, he observed that the deceased had sustained a deep subcutaneous bruise on the scalp region. There was extensive subdural haematoma on all the regions of the head. He formed the opinion that the deceased had died due to severe head injury. He was of the opinion that the head injuries which the deceased had sustained were deliberately caused and could have been sustained by a fall. The post-mortem report was produced as *prosecution exhibit No.2*. The accused persons were examined by Dr. Mugo who formed the opinion that the accused persons were mentally fit to stand trial. The P3 forms were produced on behalf of Dr. Mugo by PW8 Dr. Weru as *prosecution's exhibit No.3 and 4* respectively.

After the close of the prosecution's case, the accused were put on their defence. As stated earlier, the 1st

accused denied that she had anything to do with the death of the deceased. The 2nd accused opted to say nothing in his defence.

In criminal cases, the onus to establish the guilt of an accused person is on the prosecution. The prosecution is under a duty to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. The accused is under no obligation to prove his innocence. The duty of an accused person is only restricted to raising reasonable doubt on the prosecution's case against him.

In the present case, the prosecution relied on circumstantial evidence in its bid to establish the guilt of the accused persons. There is no direct evidence connecting the accused persons with the death of the deceased. No one saw the accused persons administer the fatal blow which caused the death of the deceased. However, the prosecution adduced circumstantial evidence in its bid to establish the guilt of the accused persons. In law, circumstantial evidence was defined by the Court of Appeal in the case of **Sawe vs Republic [2003] KLR 364** at page 372 as follows;

“In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and on a hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused.”

It is the prosecution's case, that the accused persons attacked the deceased after the 1st accused had quarrelled with the deceased over change. According to PW4, the deceased had insisted that the 1st accused owed him change on account of the liquor that he had purchased. It is however evident from the testimonies of PW2, PW6 and PW7 that it is PW7 who was purchasing the changaa at the particular time it is claimed that the 1st accused quarrelled with the deceased. PW2 gave contradictory testimony of what caused the disagreement between the 1st accused and the deceased. PW2 testified that the 1st accused quarrelled with the deceased because she had refused to sell him alcohol because it was claimed that the deceased was too drunk. He further testified that the 1st accused had abused the deceased causing the deceased to take offence. It is however evident that PW2 made peace between the 1st accused and the deceased. By the time PW2 and the deceased left the homestead of the 1st accused, the quarrel had been resolved.

It is clear from the evidence adduced by PW2, PW3, PW6 and PW7 that the deceased was very drunk when he left the homestead of the 1st accused. PW2 and the deceased were too drunk to even remember their way home. PW2 and the deceased walked aimlessly in the village to such an extent that they had to be directed home by PW3. PW2 abandoned the deceased by the road side when the deceased was completely unable to walk home. PW3 heard the deceased shouting alone at night.

The prosecution did not adduce any evidence to connect the accused persons to the death of the deceased other than the evidence that the 1st accused had quarrelled with the deceased on the evening of the 30th January 2005. Evidence was adduced how the deceased left the homestead of the 1st accused in good health. There was no evidence to suggest that the deceased had walked back to the homestead of the 1st accused after he parted company with PW2. It seems that the evidence that linked the 1st accused with the death of the deceased is the fact that the body of the deceased was found about 200 metres from the house of the 1st accused. There is no evidence linking the 2nd accused with the death of the deceased other than the fact that the 2nd accused is the brother of the 1st accused.

It is clear from my evaluation of the evidence adduced by the prosecution witnesses that the prosecution did not establish the charge of murder against the accused persons. Although the prosecution adduced evidence that the 1st accused had quarrelled with the deceased on the evening of the 30th January 2005, there is no proof that the 1st accused had a grudge to the extent that she assaulted the deceased later

that night. The evidence of the prosecution witnesses clearly pointed the fact that the quarrel between the accused and the deceased had been amicably resolved by the time the deceased left the house of the 1st accused.

As stated earlier in this judgment, it is clear that the deceased was very drunk on the material night. He was too drunk that he did not even know the direction to his home. PW2 attempted to assist him but he was unable to because the deceased kept falling down. PW2 testified that at one stage, the deceased fell down and was unable to wake up. That is when PW2 decided to go to the home of the deceased to seek help. When he returned to the scene with the son of the deceased, the deceased was nowhere to be seen. They looked for him in vain. He was found the following day lying dead under a tree about 200 metres from the house of the 1st accused.

It is therefore clear that there is no evidence, either direct or circumstantial, that connects the accused persons with the death of the deceased. The only evidence that was adduced by the prosecution witnesses is that of suspicion. Suspicion cannot form a basis for the conviction of an accused person. As was held by the Court of Appeal in **Parvin Singh Dhalay vs Republic CA Criminal Appeal No.10 of 1997 (Nairobi)(unreported)**, suspicion however strong cannot take the place of solid and affirmative proof that is required on the part of the prosecution. The assessors who assisted this court during the hearing of this murder trial were of the opinion that the prosecution had not proved its case to the required standard of proof beyond reasonable doubt. Their verdicts were that the accused persons were not guilty. I agree with their verdicts.

The accused persons are hereby acquitted of the charge of murder. They are ordered set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 31st May, 2007.

L. KIMARU

JUDGE