



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Case 11 of 2002

REPUBLIC.....APPLICANT

V E R S U S

HENRY N. GORE1ST ACCUSED

JAMES GITONGA.....2ND ACCUSED

MONICAH KALOKI.....3RD ACCUSED

JUDGEMENT

1. The three accused persons, Henry Gore, James Gitonga and Monicah Kaloki are all charged with the offence of murder contrary to s.203 as read with s.204 of the Penal Code. It is alleged that on 16.2.2001 at Miori Location, Andiara Sub-Location in Iwa Village of Meru North District, they, jointly with others not before the court, murdered Joseph Muroki.
2. The evidence tendered in support of these allegations is as follows:-P.W. 1, Shadrack Ithalia Itabara stated that he was the sub-chief of Adiala Sub-Location and that he received a report on 17.2.2001 that the deceased, Joseph Muroki, had died and his body was lying near the home of the reportee, Jacob Ntoiti, his brother. When he went to the scene, he found that the body had the head almost completely severed off. He asked relatives to cover it and made a report at Maua Police Station and the police took away the body to the local mortuary.
3. P.W.1 said that Jacob Ntoiti aforesaid had mentioned the 1st and 2nd accused persons as suspects in the murder. They were both arrested later on the material day and the body of the deceased taken to Maua Methodist Hospital Mortuary.
4. On 21.2.2001 as the body was being collected for burial, a panga was sighted inside a pit latrine at Iwa Market and P.W.1 mobilized members of the public who retrieved the panga which had bloodstains at the handle. Since it was the 3rd accused who had informed one Isaac Meme of the panga, and it having been found in a latrine near the 3rd accused's residence, she too was arrested and taken to the local police station. P.W.1 added that she also arrested the 3rd accused because a small jerrican with bloodstains on it had been recovered in the 3rd accused's house. Later in cross-examination, P.W.1 added that he saw bloodstains on coffee leaves next to the 3rd accused's house but he neither took them as exhibits nor did he call the police to visit her house nor investigate that issue.
5. P.W.2, Isaac Meme recalled that on 21.2.2001 he was shown a panga by the 3rd accused in a pit latrine and when the sub-chief, P.W.1, was called, the panga was retrieved and taken to the local Police

Station. P.W.2 denied seeing any item in the 3rd accused's house which had bloodstains and added that the pit latrine was accessible to the public.

6. P.W.2 also said that the 3rd accused told him of the panga after she visited the latrine to answer a call of nature.

7. P.W.3, Benson Mtika Nkabu recalled that on 16.2.2001 he was at Iwa Market chewing miraa with the deceased until 9.00 p.m. when the deceased went to see his brother at Meoli area. He saw the 1st accused and 2nd accused persons that evening but did not know where they went to. The next day he saw the body of the deceased with several cuts on the head.

8. In cross-examination, P.W.3 said that he saw the 1st and 2nd accused persons walking in the same direction as the one taken by the deceased on the material night and he did not see them with any weapons or even a torch.

9. P.W. 4, Stanley Mutuma recalled that on 16.2.2001 he was at Meoli shopping Centre at 9.00 p.m. when he saw the 1st accused and one Gitonga lazing about and at 9.00 p.m. they walked away towards Iwa Market. At 10.00 p.m. he also saw the deceased walking away in the same direction.

10. When P.W.4, saw the accused persons he noticed that Gitonga had a panga and also a long green coat. "**Gitonga,**" he clarified, is not the 2nd accused also called Gitonga.

11. In any event, the next day P.W.4 heard that the deceased had died.

12. P.W. 5, Festus Mugambi, an employee of the deceased was spraying miraa on 14.2.2001 when the 1st accused told him that the miraa would not be harvested until something bad had happened but since this witness was declared hostile, his evidence is wholly unhelpful.

13. P.W. 6, Gerishon Mungania, father of P.W.5 said that the 1st accused told him on 14.2.2001 that the miraa leased out to the deceased would not be harvested until he had killed someone and when he was asked who he wanted to kill, the 1st accused said the owner of the miraa or P.W.6 himself.

14. P.W.6 informed the deceased of the threat and on 17.2.2001 he saw the body of the deceased with cuts on it.

15. P.W.7, Monica Nkirote Ntoiti received information of the deceased's death and found his body at her gate. She called her husband, Jacob Ntoiti, and a report was made to the sub-chief and later the police took the body away.

16. P.W.8, Dr. Einstein Tsuma produced a post-mortem report prepared by Dr. G. Kimani. The findings were that the deceased had deep cuts on the left side of the face, anterior neck, right temporal region and right occipital region. Internally, all the neck vessels were cut off, the oesophagus was also cut off as were jugular vein and nerves. There was also a fracture of the spinal chord and his conclusion was that the cause of death was severe hemorrhage with respiratory failure due to severe cuts on the neck.

17. P.W. 9, Harriet Ncurubi was one of those who found the deceased's body while P.W.10, P.C. Francis Kimuge received the report of murder, proceeded to the scene and noted that the deceased's neck had deep cuts.

18. P.W.10 stated further that the 1st accused presented himself at Maua Police Station in the company of his advocate on 22.2.2001. He went to the 2nd accused's house and retrieved a long trouser which was blood-stained. He sent it plus a jacket retrieved from the 1st accused's house, for analysis at the Government Chemist but the report was not produced in court.

19. P.W. 10 also produced a Jerrican and a jacket which had been found in the houses of the 3rd accused and 2nd accused respectively.

20. When asked to defend themselves and in light of the above evidence, the 1st accused denied seeing P.W.4 on the material day and as regards the night of 16.2.2001, he said that he never met the 2nd accused and/or the deceased and that he spent the entire night at his home with his wife and children.

21. That on 22.2.2001 he was at his canteen when he received information that Jacob Ntoiti was looking for him allegedly for killing the deceased and fearful of him and his group, he went to make a report at Maua Police Station but he was instead arrested and charged with the offence of murder.

22. The 2nd accused stated that he had nothing to do with the deceased's death and it was only on 17.2.2001 that he knew of it and he went to the scene and found the body. He said that the deceased's wife and his wife were sisters and he had no reason to murder him.

23. As regards 16.2.2001, he admitted being at Iwa Market but denied meeting P.W.3 and P.W.4. He said that he was at Maua Town and on his way home at 6.30 p.m. went to buy medicine at Iwa market and then proceeded to his home. He did not see the deceased or the 1st accused that night at all.

24. The 2nd accused blames Jacob Ntoiti for his predicament and only because he and Ntoiti had a case in court, CMCC 116/1994 in which he had sued Ntoiti for a debt of Ksh.30,000/-.

25. The 3rd accused on her part stated that she knew the deceased but only got to know of his death on 17.2.2001 and she denied that she was the one who pointed out the panga in the pit latrine. She denied that a jerrican was found in her house, which jerrican allegedly had blood stains.

26. The assessors returned the unanimous verdict that the 1st and 2nd accused persons are guilty of the charge of murder but that the 3rd accused was not guilty. For purposes of this judgment, I should state from the outset that there is no eye witness to the offence and no murder weapon was recovered. The evidence points to the fact that the deceased left Iwa Market at about 10.00 p.m. on the night of 16.2.2001 and that the 1st and 2nd accused persons were seen walking in the same direction that night and that the next day he was found dead with his head almost completely severed off. The connection of the 3rd accused is that a panga with blood stains was found in a pit latrine in a plot where she lived and that she discovered it and that a jerrican with bloodstains was also found in her house and further that the coffee trees near her house had bloodstains. The 1st and 2nd accused person apart from being seen walking in the same direction as the deceased on the material night were also named by the deceased's brother, one Jacob Ntoiti as prime suspects in the murder and that P.W.6, Gerishon Mungania said that the 1st accused had threatened to kill the deceased and if not him, then P.W.6 himself.

27. The question is, since all the evidence against all the accused persons is circumstantial, is it sufficient to warrant the conviction of any or all of them for the offence of murder? Circumstantial evidence can only be the basis for a conviction if, as stated in Teper vs R. [1952] 2 All E.R., and before drawing an inference of the accused's guilt, the court must "**be sure that there are no other co-existing circumstances which would weaken or destroy the inference.**" In Taylor on Evidence, 11th Edition at page 74 it is stated thus;

"The circumstances must be such as to produce moral certainty to the exclusion of reasonable doubt."

28. In Simoni Musoke vs R [1958] E.A.715 it was found that where the circumstances could not conclusively point to the accused as being guilty and that the exculpatory facts were not incompatible with his innocence, the conviction was found to be improper. This was also the situation in David Achira vs R. Cr. Appeal No.47/2003 (UR).

29. Returning to the case before me and applying the above well founded principles, I should start with the 3rd accused's situation. Without saying much more than I have already said, the circumstances leading to her arrest are not such as to lead a court properly applying the law to adjudge her as guilty. There was no connection made between the panga recovered in a public pit latrine and the 3rd accused save that she recovered it as she answered the call of nature. The jerrican in her house was not tested to confirm whether what was called "**bloodstains**" were actually blood stains and if so, whose. The alleged blood stains on the coffee trees was nothing more than conjecture as the coffee leaves were neither produced as evidence nor examined by a competent person. In the end and as regards her, this court can only say that there are more than enough reasons to doubt her culpability and like the Assessors, she cannot be found guilty of the offence of murder.

30. As for the 1st accused, the evidence that he threatened P.W.6 because of a dispute over same miraa shamba and that therefore he may have had a hand in the death would be useful if connected with other circumstances thereafter leading to the 1st accused's culpability in the murder. My problem with that evidence is that the only other piece of evidence is that he was seen on the material night walking in the same direction as the deceased who was found dead the next day. No witness said where the deceased went and whether in fact they caught up with each other and when. I agree that there may be suspicion that the threat to kill was actually effected by the 1st accused but where is that evidence? Suspicion, it has been said by our courts, however strong, cannot be the basis for inferring guilt. In this case, Jacob Ntoiti is recorded as having pointed out the 1st and 2nd accused persons as suspects. The basis for that suspicion was not laid down with acceptable evidence neither did Jacob Ntoiti himself testify to justify his suspicion and elevate it to admissible levels of evidence. In the end, the evidence against the 1st accused cannot be said to have crossed the threshold of reasonable doubt and the circumstances against him do not point to the conclusion and hypothesis that he was party to the murder of the deceased.

31. As for the 2nd accused, the findings regarding the 1st accused apply to the case against him save that in fact it is wholly unclear if he was the "**Gitonga**" who was allegedly seen with the 1st accused on the material night P.W.4 who said that he saw the 1st accused that night clarified that the "**Gitonga**" in the dock and who had a panga is not "**Gitonga**", the 2nd accused. Who then determined that the 2nd accused was present and followed the deceased into the night? Again the evidence as presented is wanting and the circumstances put together do not exclude other possibilities leading to the death of the deceased.

32. In the end, I have to respectfully disagree with the Assessors for the above reasons and my mind is clear that the charge of murder and all the ingredients in it cannot be proved by the evidence laid down against all the accused persons. I may have my suspicion that they were involved but without credible evidence nothing much can be done with that suspicion.

33. I hereby acquit all the accused persons and order their release unless they are otherwise lawfully held.

34. Orders accordingly.

Dated signed and delivered this 24th day of May 2007

Isaac Lenaola

Judge

In presence of

Mr. Gitonga Advocate for the accused

Mr. Muteti State Counsel for the State

Isaac Lenaola

Judge