



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

Criminal Case 57 of 2003

REPUBLIC PROSECUTOR

V E R S U S

1. WANDANGI CHEGE MWANGI

2. JAMES MWANGI

3. FRANCIS KABUGI MWANGI ACCUSED

J U D G M E N T

The charge against the accused was murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the charge were that:-

“on the night of 19th and 20th February, 2002 at Maraca Estate within Kakamega Township of Kakamega District within Western Province, jointly with others not before the court murdered GILBERT MACHARIA.”

The prosecution called 11 witnesses in support of the charge. What emerged in the evidence adduced by the prosecution showed that the deceased, GILBERT MACHARIA, was on the night of 19th and 20th February, 2002 sleeping in a house in Maraba Estate, in Kakamega District, where he lived with his wife, JANET WANGARI MACHARIA (PW1). In the house, besides his wife, were the deceased's daughter and son, WANJIKU and RUIDICK MACHARIA respectively, and the latter's three children, Hiram, Maina, and Wanderi. The house was four roomed. The deceased was in his room and his daughter and wife were in different beds in one room. The house had security lights and the outer door was wooden.

At 2.00 a.m. that night JANET WANGARI MACHARIA, (PW1), saw flashes of torches outside the house and suddenly dogs started barking in the neighbourhood. She called her daughter Wanjiku. She put off the security lights to show the intruders that the family members were not asleep. But immediately the security lights went off, the wooden door to their house was hit with a stone. PW1 heard people talking outside and a voice asked twice in Kiswahili “*where is the old man's house?*” She was terrified. She went to the door and tried to hold it from the inside as she enquired who it was. She was ordered to open but she refused. The door was broken. A gang which had big torches entered. She was ordered to bend down and not to look at them. It was dark. They demanded money but got none. PW1 told the court that she recognized the voices of accused No.2 and Accused No.3 as they spoke outside the house. Some of the gang members entered the house while other remained outside. They took the deceased outside and when they left, they took him with them. PW2, Margaret Wanjiru Wathiong'o, a daughter of the deceased, had just arrived home with her husband, Thiong'o, on the night of 19th/20th

February, 2002. PW2 lived in Maraba Estate not far from the house of PW1.

PW1 with her son and daughter and the latter's three children immediately left their house and went to the house of Margaret Wanjiru, who with her husband, Thiong'o, offered them assistance by taking them to another neighbour, Dr. Wafula, who offered them a vehicle which took them to Kakamega Police Station. The police looked for the deceased but did not find him.

It also emerged from the evidence that the first accused, Wandangi Chege Mwangi, has married the sister of PW1 and is therefore PW1's brother in-law. He was PW1's neighbour at Maraba Estate, Kakamega, during the night of 19th/20th February, 2002. The 3rd Accused, Francis Kabuge Mwangi, is the son of PW1's brother and is therefore PW1's nephew. He was also PW1's neighbour at Maraba. The mother of Accused 2 was called Virginia Waitherero. Accused 2 had accused the deceased of having killed his mother. Waithero's home was not far from the deceased's home. She had died on 13.2.2002. It was the evidence of PW1 that Accused 2 had alleged that his mother's body would not be removed from the mortuary before the body of the deceased had been taken there. The deceased was alleged by Accused 2 to be a witch.

In her evidence, PW1 also stated that she had told her daughters, Wanjiru and Margaret w/o Thiong'o, that she had recognized the voices of Accused No.2 and Accused No.3 among the gang that abducted her husband but she omitted to tell this to the police officers who went with her to the scene but while recording her statement she told this to the police officer recording her statement. Earlier in the day on which the deceased was abducted and fatally injured, that is to say 19th February 2002, the 2nd Accused was heard by PW1 in PW1's home saying that he would harm deceased. The deceased who was present was worried about the threat to his life and told the village elder, Shaban Sakwa Hamisi (PW3), about it on the same day.

Waitherero was the first daughter of the 1st Accused and the mother of the 2nd Accused. She was sick and at home on 10.2.02. On 13.2.2002 she died at home. Mourning started. Her body was taken to the mortuary at Kakamega Provincial General Hospital.

On 10.2.2002, PW2 was in her house at 1.30 p.m. when a neighbour, Andrew Mbatia, who had sold land to PW1's parents went to her house in company of a lady who was the mother of the village elder. They warned PW2 that there had been a feud between the 1st Accused and PW1's parents and that PW1's father, the deceased, was being accused by Accused No.1 of having bewitched Virginia Waitherero, the 1st Accused's daughter. PW2 was warned that if Virginia Waitherero died, then somebody in the family of PW1 would die. Andrew Mbatia told PW2 that his son, Alfred Mbatia, was beaten by the family of the 1st Accused because, it was alleged, he delivered drugs to Virginia Waitherero at the behest of the deceased who was a witch. PW2 was requested to report to the police the threats made by Accused No.1

PW2 with her mother, PW1, her husband, Thiong'o, and George and a neighbour saw at 6.00 a.m. the deceased following a report to them by school children. The deceased had been abandoned by the abductors with severe injuries. His left hand had been cut and the right leg had four cuts while the left had three cuts. He was alive but weak. He spoke. *He told PW1 in Kikuyu that the family of PW1 had "finished" him. He did not mention the names of PW1's relatives who had abducted him and inflicted the injuries on him.* He was stark naked and had bled a lot. She said that the deceased told her and her companions that four men had abducted him and that two of them spoke Nandi while the other two spoke Kiswahili. He died later at Kakamega Provincial General Hospital without naming the abductors.

In cross-examination, PW2 said that her mother, PW1, had recognized the voice of one member of the gang that abducted the deceased but she did not tell the police this nor did she tell the police that her father, the deceased, had received threats on his life. But PW2 had told the lady Inspector, IP. Regina Musoka alias Regina Shamalla, about the threats on the night of 19/20 February 2002, while at Waitherero's house but the matter was not taken up at the police station. PW2 stated that the four police officers who went to the scene where the deceased was found did not bother with investigations and PW2 and her family were compelled to complain to the D.C.I.O who assigned other officers to the case. For

instance, she said when they went with a police dog to the house of Accused No.1, they did not interrogate Accused No.1 nor did they enter the house to find out who were in the house. In short, they failed to follow the leads.

In his evidence, PW3, Shaban Sakwa Hamisi, the village elder of Maraba B village, told the court that the deceased had reported to him on 19th February 2002, at about noon that he had a sense of foreboding that his life was in danger and he feared he might be killed any time. PW3 also testified that on 10.2.2002 at 8 P.M. Alfred Shikasia Mbat (PW4) reported to him that Accused No.1 claimed that he (Alfred) was practicing witchcraft and soon thereafter a lady known as Mama Omega informed him that somebody was being killed in the house of Accused No.1. PW3 went there and found Accused No.1 who barred him from entering the compound and locked the gate. PW3 jumped over the gate and got into the compound. There was a crowd of people gathered outside the gate. In the compound, he found Alfred (PW4) with his hands tied on his back. The latter told him that Accused No.1 alleged that he practiced witchcraft and was being used by the deceased to bring witchcraft (charms) to the daughter of Accused No.1, Virginia Waitherero. Alfred had been grabbed on the road by Alice Wambui, sister of Accused No.2, and forced into the latter's compound. PW3 called the police, and when they came, Alfred was rescued. PW3 saw the door of the house of PW1 which the abductors had broken with a stone.

Alfred Shikasia Mbat PW4 told the court in his evidence that the 1st and 2nd Accused and the wife of 1st Accused beat him mercilessly because they suspected he was being used by the deceased to deliver charms to Waitherero, the daughter of Accused 1 and mother of Accused 2.

On 18.2.2002, when PW8 was in a funeral meeting in the home of Waitherero, deceased, the 2nd Accused who was livid stated in his hearing that he would not bury his mother, Waitherero, when the deceased, Gilbert Mwangi, was still alive. There were other people in the meeting who heard Accused 2 say so, he said, and PW8 and others tried to calm Accused 2 down. A friend of Accused 2, one Zacharia, was seen by PW8 in the meeting and he disappeared alone and came back at 4.00 a.m. on the night of 19/20 February 2002 and went straight to the house of Waitherero where the said Accused was. PW8 saw Zacharia again leave and go away. Soon after, the police, in company of PW1 and PW2 and PW3, came with the dog and dog handler, PC Mwangi (PW10).

PC Joseph Mwangi, (PW10), the dog handler, said his dog was called "HAWK". It accompanied him and PC Muturi and a driver. The dog led the team to the home of Accused 1 whose daughter Waitherero had died. The dog barked at and identified Accused No.1 whereupon PW10 flashed a torch at him and ordered him to walk out and withdrew the dog and commanded it to stop barking. There were many mourners in the home. Accused No. 1 refused to comply with the order to step out. The duty officer, Regina Musoka alias Regina Shamalla, and Crime standby PC Peter Muturi talked to Accused No. 1. PW10 did not know what was discussed. Then they left.

When PW11, PC Aggrey Mungasi took over the investigations, he arrested 5 suspects. These were the present three accused and David Nangilo Karani alias Tausi and Zacharia Imbayi and Enock Yeswa Musungu. They were charged with murder but the case was withdrawn on the advice of the Attorney General who subsequently gave directions for the five accused to be rearrested and charged again. The present accused were rearrested but the other accused are still at large. PC Peter Muturi (PW9) handed over investigations on the case to PC Mungasia of C.I.D. before the accused had been arrested.

Dr. Geoffrey Wechuli, (PW7), produced the Post Mortem report of the deceased showing the deceased died due to cardiopulmonary arrest. He noted the deceased had traumatic amputation of the left hand, deep cut wound on right thigh, bilateral cut wounds on lower legs. He also produced P3 forms for the Accused certifying that they were fit to stand trial.

The accused persons after being put on their defence gave evidence as follows:-

Accused No.1, Wandangi Chege Mwangi, gave sworn evidence. He testified that he lived in Maraba Kakamega and that he and the deceased, Gilbert Macharia, who was his neighbour had married sisters and that the 2nd accused, James Mwangi, is his grandchild while the 3rd accused, Francis Kabuga Mwangi

is his son. His first born daughter, Virginia Waitherero, who fell ill on 20/10/2000 and was later operated on 23.1.01 died on 14th February, 2002. On the night of 19th/20th February, 2002, 1st Accused was sitting outside the house of Virginia Waitherero when police officers who included Inspector Regina Shamalla came there with a dog and a dog handler. Accused 1 told them that all his children who included 2nd Accused and 3rd Accused were inside the house except 2 whom he had sent to Nyandarua. His wife, he said, was also in the house as was also his daughter. The police left for the village elder's house. The body of Virginia Waitherero was collected from the mortuary on 20/2/02 and was on the same day buried in Nyandarua. The accused was at that funeral and he said he returned to Kakamega after 3 days. It was his evidence that the deceased's family and his own family had a cordial relationship. He denied that he had accused Gerald Macharia of witchcraft. He said his daughter Virginia Waitherero had died of cancer and not witchcraft.

The 2nd Accused, James Mwangi, also gave sworn evidence in which he said that he was a businessman before his arrest and lived in Maraba-Kakamega. His mother was Virginia Waitherero. He knew the deceased, Gilbert Macharia, who was his relative. He denied having killed Gilbert Macharia. He testified that on the night of 19th/20th February, 2002, when Gilbert Macharia was murdered he was in the house of Virginia Waitherero, his mother, engaged in arrangements for the funeral and that at no time did he leave the homestead. For this reason the voice heard in the home of the deceased, Gilbert Macharia, that night could not have been his. He said in evidence that Janet Wangari (PW1), the wife of Gilbert Macharia, deceased, who had testified that she had heard the voice of the 2nd Accused, saying in Kikuyu on that night (19th/20th February 2002) when Gilbert Macharia was abducted from the house by thugs, "go bring that woman if the daughter is not there" had told lies when she said that she had heard the 3rd accused, Francis Kabuge Mwangi, retort to the 2nd Accused that they could not take both the man and his wife. Although PW1 had testified that the 1st accused has married her sister and that she PW1 was a neighbour of the 1st accused at Maraba, Kakamega, the 2nd Accused termed this evidence as a lie and stated that PW1 had not told this to the police. He also denied that the police dog had picked him. He testified that he went to the funeral of his mother, Virginia Waitherero in Nyandarua and returned to Kakamega on the day he was arrested.

In cross-examination, he admitted that he had gone to his house at 1 p.m. and returned to his mother's house at 2 p.m. and found the 1st Accused there who never left that night (19th /20th February, 2002). He himself never left the compound. He also testified that the 3rd accused was with him in his mother's house throughout the night the deceased was murdered.

A son of the 1st Accused and a brother of the 2nd Accused, the 3rd Accused, Francis Kabuge Mwangi, also gave sworn evidence. He denied murdering Gilbert Macharia, the deceased. Like the 2nd Accused, he testified that throughout the night of the deceased's murder, he was in the house of Virginia Waitherero where the family was discussing funeral arrangements. He told the court that the relationship between the family of Gilbert Macharia and his family was good. Like the 2nd Accused, he did not notice that Police officers had come to the home on the night of 19th /20th February 2002. He was arrested after the burial of Virginia Waitherero when he returned to Kakamega. He told the court in his evidence that the deceased, Gilbert Macharia, went to Virginia Waitherero's house on 19th /20th February, 2002 at Maraba Estate and that that is the last time he saw him.

The accused in effect set up defences of alibi by saying they were in another place when the deceased was abducted and killed. They all claimed to have been in the home of Virginia Waitherero. The police went there but did not enter the house. But they did see the 1st accused outside the house who told them that the other accused with other family members were in the house engaged in a meeting for the funeral of Virginia Waitherero. Why the police never entered the house to check remains a mystery.

The evidence in this case is circumstantial. There was evidence of voice recognition of Accused numbers 2 and 3 by PW1 which, if true, could place the accused at the scene of the crime. But PW1 did not tell the police about it and its dependability reposes on its credibility. The statements by the deceased before he

died did not name any of the accused but generally alluded to “your people have killed me” meaning members of the family of the accused.

The death of the deceased was on 18th /19th February, 2002. PW1, the wife of the deceased, was the star witness. She was at the scene. She heard what was being said by the abductors but could not see any of them in darkness. PW8 told the court that accused 1 and accused 2 kept going in and out of the homestead of Virginia Waitherero on the night the deceased was murdered implying that they had opportunity to commit the crime. The motive the prosecution sought to establish on the part of the accused was vengeance but the accused claimed that the two families enjoyed a cordial relationship. On the basis of the evidence I am not prepared to believe that such relationship was cordial.

Under section 77 (2) (a) of the Constitution of Kenya, the accused are assumed to innocent until they or any of them is proved guilty. The offence of murder under section 203 as read with section 204 of the Penal Code, Cap 63, is constituted if a person, of malice aforethought, causes the death of another person by an unlawful act or omission. Under section 206 of the Penal Code, malice aforethought is established by evidence proving any one or more of the following circumstances –

- (a) *intention to cause death of or to do grievous harm to any person, whether that person is the actually killed or not;*
- (b) *knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.*
- (c) *an intent to commit a felony*
- (d) *an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

The burden of proving the accused guilty reposed on the

prosecution throughout and the standard was proof beyond reasonable doubt. There was no direct evidence in this case linking the accused to the offence. The test to be applied before inferring guilt on the part of the accused in a case such as this which was based on circumstantial evidence was spelt out in SIMON MUSOKE v. REPUBLIC [1958] EA at page 716 where the Court of Appeal held, inter alia –

“in a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.”

Was there any motive on the part of the accused in this case to harm the deceased and what were the inculpatory facts and were they incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of their guilt.? The prosecution witnesses gave evidence to show that the accused had a motive to murder the deceased. PW1 testified that the 2nd Accused had alleged that his mother’s body would not be removed from the mortuary before the body of the deceased had been taken to the mortuary. The 2nd accused was heard by PW1 in PW1’s home stating that he would harm the deceased. PW3, a village elder went to the home of accused 1 on the night of 18th /19th February, 2002 and although Accused No.1 tried to bar him from gaining entry into the compound, he managed to jump over the gate and when he got into the compound, he found PW4 with his hands tied on his back. PW4 told him that Accused No.1 had alleged that he (PW4) practiced witchcraft and was being used by the deceased to bring (witchcraft) charms to the daughter of accused No.1, Virginia Waitherero. It was PW3’s evidence that on 10.2.2002 at 8 p.m., PW4 had reported to him that Accused No.1 had claimed that he, PW4, was practicing witchcraft.

Motive in murder cases is often an important element where the evidence in support of the charge is circumstantial because it sheds light on the actions and conduct on the part of the accused. In this case, the evidence shows that there was motive on the part of the 1st and 2nd accused to harm the deceased.

The inculpatory facts included the evidence of PW1 who testified that recognized the voices of the 2nd and 3rd accused at 2.00 a.m. on the night of 19th-20th February, 2002 as they spoke outside the house of the deceased before the abduction and subsequent murder of the deceased. According to PW1's evidence, Accused 1 and 2 did not enter the house. And as they were known to PW1, it is hardly likely that they would have wished to expose themselves by talking loudly in a manner PW1 could recognize their voices if she was familiar with the same. The thugs who entered the house, and spoke to her were not known to her. PW1 did not tell the court what each of these two accused said, much less attribute any statement to one or the other of the two but she was sure that she heard their voices. PW1 did not tell the court how familiar she was with the voices of Accused 1 and 2 and while she may have been telling the truth, evidence was necessary in this regard to ensure that the voices she heard were those of the 1st and 2nd accused and not those of other people.

Voice recognition is receivable and admissible in evidence and can carry as much weight as visual identification. The Court of Appeal in *DISHON LITWAKA LIBAMBULA v. REPUBLIC* [KSM C.A. CRIM. APPEAL NO.140 OF 2003] quoting *CHOGE v. R* [1985] KLR 1 observed that care is necessary to ensure that such evidence was that of the accused person's voice with which the witness was familiar and that the conditions prevailing at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

In the instant case PW1 did not indicate the circumstances in which she had become familiar with the voices of the 1st and 2nd accused nor did she testify as to what each of the two accused said. It was in evidence that the 1st and 2nd Accused were relatives of PW1 but their interaction or closeness, if any, was not indicated. If the evidence of PW1 relating to the 1st and 2nd Accused was reliable, it could place the said accused at the center stage of the crime and destroy any alibi put up as a defence.

The dog handler, PC Joseph Mwangi (PW10), testified that "HAWK", as his dog was called, led him and PC Muturi to the home of the 1st accused. He told the court that HAWK barked and identified the 1st Accused. He testified that HAWK had picked scent from the door of the house of the deceased and that it led PW10 and his said colleagues to Accused No.1 at whom it barked while 5 to 10 metres away. The duty officer, Regina Shamalla, and the Crime Standby officer, PC Peter Muturi, spoke to the 1st Accused after this and left him alone as HAWK was withdrawn on their instructions.

The extent to which the evidence of HAWK's handler can be relied on depended on whether there was other supporting evidence. In absence of other supporting evidence, it fell far too short. At any rate the manner in which the police officers conducted themselves when HAWK identified Accused No. 1 left a lot to be desired. The Prosecution omitted to lead evidence on the training and experience of HAWK.

In their defence, the 1st, 2nd and 3rd Accused put up defences of alibi and testified that they were in the funeral meeting in Virginia Waitherero's house on the night of 19th/20th February 2002 when the deceased was abducted from his house and subsequently murdered. If there was reliable and conclusive evidence of the dog handler (PW10), this would have placed Accused No. 1 at the home of the deceased at that time and the defence of alibi would have been destroyed. The 2nd and 3rd Accused, too put up alibi as defence and testified that on the night of 19th/20th February, 2002, they too were in the house of Virginia Waitherero. If the evidence of voice recognition of Accused 2 and 3 by PW1 on the night when the deceased was abducted amounted to proof beyond any reasonable doubt, the defences of alibi would have collapsed. But once alibi defences were put up, the burden of disproving the same shifted to the Prosecution. In the circumstances of this case, it cannot be said that the defences were dislodged.

This case rested on circumstantial evidence and it was necessary for the prosecution to show that the evidence irresistibly led to only one conclusion, namely that the accused murdered the deceased. It was

said in *R. v. Taylor Weaver and Donovan (1928) 21 Cr. App R 20* that the principle as regards the application of circumstantial evidence was that it *“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 that it is circumstantial.”*

In this case, can it be said that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of their guilt?

The salient factors in the prosecution evidence were PW1’s voice recognition of Accused 2 and 3 and the identification of Accused 1 by “HAWK” coupled with the motive of the accused to do harm to the deceased. There is a formidable case of suspicion made out by the prosecution against the Accused. But it is unsafe to rely on the voice recognition and the dog handler’s evidence. In the absence of these, the links that would have established the irresistible inference of the accuseds’ culpability in the deceased’s murder are lacking and the defences of alibi remain in place. This is a case in which the officers who were engaged in investigations left a lot to be desired. Duty Officer, Regina Shamalla and Crime Standby Officer, Peter Muturi did not do their work as well as they were required to do. They failed to conduct search and to collect evidence. They ignored identification by “HAWK” of Accused No. 1 and whisked it away.

The Senior Principal State Counsel, Mrs. Kithaka, who conducted the prosecution, urged the court to treat the deceased’s statement to PW3 as a dying declaration. Section 33(a) of the Evidence Act Cap 80 states:-

“33 (a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question and such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

The statement made by the deceased to PW3, Shaban Sakwa Hamisi, a village elder, on 19/2/20002 in PW3’s house was that the deceased’s life was in danger and that he could be killed any time. He did not tell PW3 who had threatened to kill him. It would therefore not implicate the accused.

When PW1 spoke to the deceased after he had been found brutally tortured and injured, the deceased did not name any person. He referred to the family of PW1 and said that that family had finished him. This evidence referred to family members of the Accused. It did not refer specifically to any one member in that family.

The deceased was brutally murdered. The Police bungled the investigations. The evidence adduced fell short of the standard required to prove the Accused guilty. In the result, I have no alternative but to acquit the accused which I hereby do. Unless otherwise lawfully held, the Accused shall be released and set free forthwith.

Dated, signed and delivered at Kakamega this 17th day of May, 2007.

G. B. M. KARIUKI

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