



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

Criminal Case 31 of 2004

REPUBLIC PROSECUTOR

VERSUS

ANTHONY MBOGO NYAGA ACCUSED

J U D G M E N T

Anthony Mbogo Nyaga (hereinafter referred to as the Accused) is arraigned before this court charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that on the 18th day of September 2004 at Kiamachiri village in Kirinyaga District of Central Province. He murdered Alice Wanjiru Rubari (hereinafter referred to as the deceased).

A total of 12 witnesses have testified in proof of the prosecution case. Briefly their evidence was as follows:

The deceased was the paternal grandmother of the accused. They were living in the same homestead though each had his own house.

On the 18th September 2004 at around 11.00 a.m. Jackline Wawira Nyagah (P.W.5) a sister to the Accused left the deceased cooking and cleaning utensils in her kitchen. P.W.5 went to sleep because she was having a headache. She was woken up at around 12.00 noon by the Accused who sent her to the shops to buy him some soap. When P.W.5 came back from the shops she saw the Accused coming from the direction of the deceased's house hurrying. P.W.5 called out to him but the Accused apparently did not hear. While P.W.5 was outside their house she saw a flame of fire in her grandmother's kitchen. She wondered about the fire but did not check it out. Instead she went back to sleep.

Shortly thereafter (or shortly before) Israel Nyamu Kiriungi (P.W.1) a brother in law to the Accused was passing by when he noticed the deceased seated on a chair in the kitchen facing the opposite direction. P.W.1 spoke to the deceased but she did not respond so P.W.1 just passed and proceeded to the shamba where he started harvesting maize. He was soon joined by the Accused who assisted him. They finished at around 1.00 p.m.

On his way back P.W.1 used the same route and again found the deceased still seated in the same position. He spoke to her 3 times but again she did not respond. P.W.1 then entered the kitchen and noticed that the deceased was burnt on the right side from the shoulder downwards. P.W.1 came out of the house and called the Accused and told him to go and call his Aunt Phyllis Muthoni (P.W.4), the Accused however refused to go but instead called P.W.5 who was sent to call P.W.4.

P.W.4 came and upon entering the kitchen confirmed that the deceased was dead. She noted that apart from the burns, the deceased had an injury on her head from where blood was oozing out.

The Accused who was within the homestead then said something to the effect that the deceased had died and those who wanted to divide the land could now do so. This infuriated his cousin Henry Githaka Kiragu (P.W.3) and his aunt P.W.4 who screamed in anguish. Members of the public who were around were also not amused by the Accused's comments. Suspicion immediately fell upon the Accused who was apprehended and tied up. The suspicion was fuelled by the fact that the Accused had an acrimonious relationship with the deceased. A month prior to this incident the Accused had threatened the deceased and she had to lock herself in her house whereupon in a fit of rage the accused hit the deceased's dog with a slasher killing it.

A report of the murder of the deceased was made to Kianyagah Police Station and Inspector Josphine Wambua (P.W.12) proceeded to the scene where she found the body of the deceased. The body was photographed by P.C. Ndei Kanyi (P.W.11) of the scenes of crime. It was thereafter taken to Kerugoya Hospital mortuary. P.W.12 also re-arrested the Accused and took him to Kerugoya police station.

On 27th September 2004, the body was identified to Dr. John Njau Ngotho (P.W.9) by the deceased's son in law Robert Gataba (P.W.6) in the presence of P.C. Francis Makori (P.W.7) of Kerugoya Police Station.

Dr. Ngotho noted that the body had burns over the face, trunk and upper limbs and also noted lacerations and bruises on the right parietal region and a depression over the skull. On internal examination he noted that there was extra cranial haematoma, comminution of the frontal parietal part of the occipital bone on the right side with extra dural haematoma. He formed the opinion that the cause of death was severe head injury resulting in subdural haematoma with comminution of the skull most likely due to a blunt head injury.

On the 28th September 2004 Dr. Abraham Gatangi (P.W.10) examined the Accused and found that his physical and mental status was normal. Consequently the Accused was charged with the offence of the murder of the deceased.

In his defence the Accused gave sworn evidence in which he explained that on the material day he went to his grandmother's house where his sister (P.W.5) also joined him and they had tea together. The deceased then asked him to go and look for firewood but he promised to do so on coming back from Kutus town where he was going. He went to Kutus and on his way back at about 1.30 p.m. passed through their shamba where he found P.W.2 harvesting maize. He assisted P.W.2 until they finished. They then walked together until they parted when he went to his house and P.W.2 went to the deceased's house.

Two minutes after entering his house the Accused heard P.W.2 calling him. He had just lit a stove intending to make some tea so he asked P.W.5 to go and call P.W.4 as P.W.2 had requested Accused to call her. P.W.5 ran to P.W.4 and it was when she came that they realized the deceased was dead. The Accused maintained that he had a good relationship with the deceased. He denied having chased her or having killed her dog with a slasher. He admitted having said that people should now distribute land as they wanted since his grandmother was dead. He explained that this was in reference to his relatives who had complained that the deceased had not divided the land properly. The Accused further explained that he had strained relations with P.W.4 & P.W.5 and that was the reason why they tried to implicate him with the offence.

There is no doubt that the deceased died as a result of severe head injuries. However no witness actually saw the accused person assault the deceased. The evidence against the Accused is therefore purely circumstantial evidence. In order for the court to be able to convict on such evidence, the circumstances from which the conclusion of guilt is to be drawn must be fully established and the facts so established must be consistent only with guilt of the Accused and finally there must be no co-existing factors which may weaken the inference of guilt.

The inculpatory facts alleged against the Accused are as follows: -

- That at around 12.00 noon He sent P.W.5 to the shops and therefore remained in the homestead alone with the deceased.
- That when P.W.5 came back from the shops she saw the Accused coming from the direction of the deceased's house hurrying.
- That while P.W.5 was outside the house she saw a flame of fire in the deceased's kitchen.
- That about an hour later when P.W.1 noticed that there was something wrong with the deceased He sent Accused to go and call P.W.4 but the Accused refused to go and instead sent P.W.5.
- That when it was confirmed that the deceased was dead the Accused went round the homestead saying that the deceased had died and those who wanted to divide the land could now do so.
- That the Accused had an acrimonious relationship with the deceased and had a month before threatened the deceased and killed the deceased's dog with a slasher.

It is debatable as to whether all these circumstances were established, but even assuming that they were, the circumstances merely creates a suspicion that the Accused may have been involved in the death of the deceased. The circumstances do not however point irresistibly to the Accused person having assaulted the deceased or in any way contributed towards her death.

Apart from what P.W.4 and P.W.5 stated which was pure conjecture no effort was made by police to investigate the case or to carry out any forensic examination to link the Accused with the offence. Moreover the Accused gave a sworn defence in which He explained his conduct thus weakening the inference of guilt. In a criminal case the burden of proof always lies with the prosecution to prove its case beyond any reasonable doubt. Suspicion no matter how strong cannot discharge this burden. In the circumstances this court is left with no option but to give the Accused the benefit of doubt.

For this reason this court disagrees with the majority opinion of the assessors and finds the case against the Accused not proved to the required standard.

Accordingly the Accused is found not guilty and is acquitted of the charge under Section 322 (2) of the Criminal Procedure Code.

The Accused shall be set free unless otherwise lawfully held.

Dated, signed and delivered this 25th day of February 2006.

H. M. OKWENGU

JUDGE