



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Case 23 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

JULIUS MAINA GITOI.....ACCUSED

JUDGMENT

The Accused person is charged that on the night of 2nd and 3rd November, 2003 at Mukure Sublocation Mutira Location Kirinyaga District he murdered Eunice Wangechi Gakuo.

Witnesses gave evidence that the Accused person was one of the three employees of the deceased who were living in the home of the deceased together with a son of the deceased called Simon Kagema Gakuo who gave evidence as PW4. Each person slept in his own room sharing a different house block from the one in which the deceased slept – the main house. Other members of the family were working and lived away from that home.

Prior to the 2nd November, 2003, the other two employees had been given permission to go to their respective homes after pay. In that home therefore there remained the deceased and her son Simon Kagema Gakuo and the Accused. With his salary money in his pocket, the Accused seems to have enjoyed himself taking beer during the day until the evening on 2nd November, 2003 sometimes with Simon Kagema Gakuo, sometimes with other people and in the evening Simon Kagema Gakuo had to lead the Accused back home on the basis that the Accused, so drunk could not take himself back home.

After reaching home during that night of 2nd and 3rd November, 2003 Simon Kagema Gakuo did not allow the Accused person to cook his food because he thought the Accused was too drunk to cook safely. He therefore led the Accused person to his room and bolted the door from the outside to prevent the accused from going outside his room. Simon Kagema Gakuo said that he also went to his room to sleep until the following day 3rd November, 2003 – just as it was everybody else.

But it was that morning that the Deceased was found in her house dead with the door to the house and all windows securely locked.

She had depressed compound fracture on the right side of the head where there was brain damage and intracerebral haemorrhage.

Dr. Paul Mbalu who performed the post mortem formed the opinion that the cause of death was head injury due to blunt trauma on the right side of the head inflicted with blunt object.

Those are injuries which could have been inflicted by a human being although the door and windows were all found intact.

As to the position of the Accused that morning, what Simon Kagema Gakuo told the court is different from what the Accused told the court. According to Simon Kagema Gakuo, he never saw the Accused that morning although the door of the house of the accused was still bolted from the outside and he suspected the Accused had gone out of his room through a back window which was big enough for someone to pass through. When the Accused went out, he had locked the door from the inside so that later when with the police, Simon Kagema Gakuo had to pass through the back window to go and unlock the door from the inside for the police to enter the room to take the two shirts attributed to the Accused person.

On the other hand the Accused told the court that he persuaded Simon Kagema Gakuo, promising to give him a cigarette, to open the door for him. Simon Kagema Gakuo opened the door and the two went to their kitchen where they had to fetch fire necessitating that early morning visit, by the Accused; to the home of a neighbour Catherine Wangui Wanjau who gave the Accused two match sticks and the Accused returned to their kitchen where Simon Kagema Gakuo was and Simon was able to light his cigarette. But the accused decided to leave for Nanyuki soon thereafter and therefore, went to pack his things and left for Nanyuki, selling some of his things to get transport because he had misused his salary the previous day.

To cut a long story short, The Accused left that morning and never returned to that home again and had to be arrested at Nanyuki several months after the death of the deceased. He was charged with this offence.

The evidence of the Government Analyst concerning blood samples and blood stains did not link the Accused to the offence in this case.

The Accused person defended himself on oath and was cross examined denying that he committed the offence. He explained that although he used to work for the deceased, his work was not regular and therefore when he was paid that time, he was going to stay for some days before being given some work to do. He had therefore to leave for Nanyuki because somebody had promised to get him a job there, and from what he and Simon Kagema Gakuo said, by the time the Accused left, it had not been discovered that there was something wrong with the deceased in her house.

On the whole, the evidence adduced against the accused is circumstantial evidence. To sustain a conviction, such evidence must irresistably point at the guilt of the Accused person. There ought to be no other reasonable explanation.

“The inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

See Kipkering Arap Koske & Another -vs- Republic (1949) 16 EACE 135

I do not find that to be the position here. Firstly, Simon Kagema Gakuo stood in no better position than the Accused person in so far as suspicion was concerned. Is it because he was at home the morning of 3rd November, 2003 when the Accused was not there? In fact they were both suspects and was detained by the police for some time and his blood sample, like that of the Accused, sent to the Government Chemist, Nairobi for examination as a suspect. But he has been the star prosecution witness in this case. As such, care must be taken about his evidence.

Apart from the Accused and Simon Kagema Gakuo, the evidence left the possibility of someone else being the murderer of the deceased. The prosecution did not care to close that gap, for example, by bringing out the evidence of the motive for the murder directed at the Accused. Police investigation left fatal gaps in the prosecution's case and in the circumstances, I must agree with the unanimous verdict of the three assessors in this case that on the evidence before this court, the Accused person is not guilty.

Accordingly, I do not find the Accused guilty of murder in this case. The case is hereby dismissed and the Accused acquitted. He be set at liberty forthwith unless lawfully detained in some other cause.

Dated, delivered and signed at Nyeri this 31st day of March, 2006.

J. M. KHAMONI

J U D G E