



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 3 of 2004

REPUBLIC.....PROSECUTOR

VERSUS

JAMES GITHENJI NDUNGU.....ACCUSED

JUDGMENT

The accused, James Githenji Ndungu was charged with **Murder** contrary to **Section 203 as read with Section 204 of the Penal Code**. The particulars of the offence were that on the night of the 3rd & 4th November, 2003, at Kwa Amos Centre Bahati in Nakuru District, the accused murdered Elizabeth Waithera Mwangi (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge of murder. The prosecution called ten witnesses in its bid to establish the charge against the accused. After the close of the prosecution's case, the accused was put on his defence. He gave an unsworn statement in his defence. Mr. Wamaasa, learned counsel for the accused made closing submissions urging this court to find that the prosecution had not established the guilt of the accused to the required standard of proof. He urged this court to acquit the accused. Mr. Koech for the State, on the other hand, submitted that the prosecution had proved its case to the required standard of proof beyond reasonable doubt. He urged this court to convict the accused as charged.

I will analyse the submissions made by the counsel for the accused and by the learned State counsel after setting out the facts of this case as narrated by the prosecution witnesses. The deceased was married to PW4 Paul Mwangi Macharia. PW4 was married to two wives; the deceased and another wife. The facts of this case disclosed that PW4 rarely lived together with the deceased. The deceased lived with her adopted son, PW2 David Mwangi Macharia. At the material time, they lived in a four roomed timber house at Kwa Amos farm in Bahati Division of the Nakuru District. According to the testimony of PW2, he used to sleep in the same house with the deceased. The deceased slept in a separate bedroom from that of PW2. Their bedrooms were separated by the sitting room which was between the two bedrooms. There was a kitchen which was constructed outside the main house.

On the 3rd of November, 2003 PW2 recalled that he took supper with the deceased. At about 9.00 p.m., PW2 went to sleep in his bedroom. He testified that he left the deceased in the kitchen. At the material time the PW2 was aged about 14 years and was a student at Kagoto Primary School. PW2 slept soundly until the following morning i.e. the 4th of November, 2003 about 6.00 a.m. when he woke up and made preparations to go to school. He then called the deceased to wake up so that she could make him breakfast. The deceased did not answer. PW2 went to the bedroom of the deceased and realized that the deceased was no where to be seen. The items in the room were scattered on the floor. It appeared as if some one had thrown the properties of the deceased helter-skelter on the floor as if he was looking for something. Some items had been burned on the floor including some plastic containers.

PW2 realised that a hardboard wooden box belonging to the deceased was missing. He then knew that there was something amiss. He went to the house of PW1 Musa Okoth, a neighbour and informed him that the deceased was missing. PW1 who was then asleep woke up and accompanied PW2 to their home. Meanwhile PW2 had also informed other neighbours called Mama Muthokoro and Mama Anna that the deceased was missing. They all converged in the house of the deceased. It was then that PW1 and PW2 saw that there were marks on the ground as if something had been dragged from the house to the pit latrine within the compound. PW2 testified that a girl from the neighbourhood called Elishiba peered inside the pit latrine and saw the body of the deceased. She screamed and alerted all the neighbours. PW1 went to his house and brought his torch. He shone the torch inside the pit latrine and confirmed that it was actually the deceased who was inside the pit latrine.

A decision was made to inform the area chief who in turn informed the police at Bahati Police Station. PW7 Sgt Maurice Odhiambo, with other police officers visited the scene and saw the body of the deceased lying in the pit latrine. Among the police officers who accompanied PW7 was PW3 PC Livingstone Lihanda, a Scenes of Crime Officer based at the provincial CID office, Nakuru. PW3 took ten photographs at the scene showing various aspects of the crime scene. The photographs were produced as *prosecution's exhibit No.2*. PW7 then ordered the pit latrine to be demolished to enable the body of the deceased to be retrieved. The body of the deceased was retrieved and taken to Nakuru Municipal Mortuary for the purposes of a postmortem being performed to establish the cause of her death.

Meanwhile, at about 6.00 a.m. on the 4th of November, 2003, as PW5 John Mathu Githuku was rushing from his residence to his place of work (*he was a farm hand employed by one Baba Karanja and whose duties, inter alia, included milking cows*). He testified that he had woken up late and at the time desired to reach his place of employment as soon as possible. While walking towards his employer's house, he met with the accused coming from the direction of the house of the deceased. PW5 testified that the deceased was carrying a wooden box. PW5 knew the accused before the material morning. He recalled that the accused appeared to be in a hurry. He did not speak with him but proceeded to his employer's farm. At about 8.00 a.m. on the same day, he learnt that the deceased had been killed and a wooden box stolen from her house. It is then that he recalled that he had seen the accused carrying the wooden box. He informed the police. He testified that when he saw the accused carrying the box, he thought that the accused had left his employment and was travelling elsewhere.

PW9 PC George Odera was the investigating officer in this case. He visited the scene and later took the statements of the witnesses. On the 24th of December, 2003 at 10.00 a.m., he was informed by the OCS of Bahati Police Station that the chief of Kabatini Location had information of the whereabouts of the accused. PW9 went to the offices of the area chief and found PW8 Naftali Nganga Ndungu, the brother of the accused. PW8 then volunteered to take the police to their home at Timboroa in Uasin Gishu District. The home of the accused is about 100 kms from the house of the deceased. They reached Timboroa at about 8.00 p.m.

PW9 sought the assistance of the police from Timboroa Police Station. They went to the house of the accused. They found the accused. They arrested him. PW9 inquired from the accused the whereabouts of the wooden box. The accused told PW9 that the wooden box was in the house of his friend called Waweru. The police escorted the accused to the house of Waweru. They did not find Waweru but found his wife. The accused then showed the police two cups which he claimed were given to him as gifts by the deceased. The wife of Waweru could not however tell the police where the wooden box was kept. Later, Waweru took the wooden box to Timboroa Police Station together with five other cups which had been handed to him for safe keeping by the accused.

The police at Timboroa informed PW9 of the development. PW9 went to Timboroa Police Station on the 30th of December, 2003 and collected the wooden box together with the five cups. The wooden box was produced in evidence as *prosecution's exhibit No.1*. The seven cups were produced in evidence as *prosecution's exhibit No.3*. The said wooden box was positively identified by PW2 as the one that used to belong to the deceased and was kept at her bedroom prior to her death on the 3rd of November, 2003. PW2 testified that he discovered the box was missing on the 4th of November, 2003 when he was asked

by the police if there was any item which was missing from the bedroom of the deceased. Similarly PW4, the husband of the deceased, positively identified the wooden box recovered from Timboroa as the one which used to belong to the deceased. PW5 further identified the wooden box as the one he saw the accused carrying at about 6.00 a.m. on the 4th of November, 2003.

PW6 John Mwaniki Hihu, a son in-law to the deceased identified the body of the deceased when the postmortem was performed by Dr. Aduro on the 7th of November, 2003. The postmortem report was produced by PW10 Dr. Philip Wainaina Kamau on behalf of Dr. Aduro who is undertaking postgraduate studies at the University of Nairobi. He testified that Dr. Aduro observed that the deceased had dislocated her left shoulder. There were bruises of 6 x 8 cm over the shoulder joint. There were linear bruises on the back of the head. According to Dr. Aduro, the said bruises were caused after the death of the deceased. There were bruises on the facial region. There were signs that the deceased had bled from an injury on her forehead. The left side of the chest was deformed. On internal examination, it was observed that the deceased had sustained the fracture of the 2nd, 3rd and 4th left ribs. There was massive haemothorax. Dr. Aduro formed the opinion that the cause of death of the deceased was cardiopulmonary arrest due to massive haemothorax. The postmortem report was produced as *prosecution's exhibit No.4*. Dr. Aduro further examined the accused to determine if he was mentally fit to stand trial. He established that the accused was mentally fit to stand trial. The P3 form was produced as *Prosecution's exhibit No.5*.

When the accused was put on his defence, he offered an unsworn statement. He testified that the deceased had given him the wooden box and the seven cups as gifts some seven months prior to his arrest. He denied that he had killed the deceased. He testified that he was innocent and was arrested and charged by the police for an offence he did not commit.

This being a criminal case, it is the duty of the prosecution to establish the guilt of the accused to the required standard of proof beyond reasonable doubt. The onus of adducing evidence to establish the guilt of an accused person is always on the prosecution. The accused is under no obligation to prove or establish his innocence. In the present case, no one saw the accused kill the deceased. The evidence that was offered by the prosecution in a bid to prove its case on the charge of murder against the accused is circumstantial evidence and the evidence of the recovery of some of the items which were allegedly robbed from the house of the deceased on the night that she was killed.

For the prosecution to succeed in proving its case based on circumstantial evidence, it must establish to the required standard of proof beyond reasonable doubt, that it is the accused, and no one else who could have committed the crime. Circumstantial evidence establishes the guilt of an accused person by inferring on the surrounding circumstances to prove the guilt of such an accused person. The said surrounding circumstances must be such that it points to the guilt of the accused person to the exclusion of any other person and is incompatible with the innocence of the accused. As was held by the Court of Appeal in the case of **Sawe vs Republic [2003] KLR 364** at page 372;

“In order to justify, on circumstantial evidence, the inference of guilt, 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. There must be no 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.”

In the present case, the prosecution adduced evidence to the effect that the accused had worked for the deceased for a period prior thereto to the fateful night. From the evidence adduced in court, it is clear that the accused had ceased working for the deceased a few months prior to her violent death. The accused was related to the deceased. She called the deceased grandmother. On the fateful evening, i.e. the 3rd of November, 2003 the deceased and PW2 took supper. PW2 is the adopted son of the deceased. PW2 went to sleep at about 9.00 p.m. He left the deceased at the kitchen which is outside the main house. PW2 was then about 14 years of age. He slept in one of the two bedrooms in the main house. The deceased slept in the other bedroom. The two bedrooms were separated by the sitting room. When PW2 woke up in the

morning, he discovered the deceased missing. He went to the room of the deceased and saw that her property had been scattered all over the room. Her wooden box was missing. No one saw the accused at the scene. When PW2 woke up in the morning i.e. at 6.00 a.m. on the 4th of November, 2003, he found the door to the main house open. There was no evidence that the door had been broken or had been tampered with.

The evidence that however connects the accused with the death of the deceased is the testimony of PW5 who testified that at 6.00 a.m. on the 4th of November, 2003 as he was walking towards his place of employment, he saw the accused carrying a wooden box (*which he later identified when the same was recovered from the accused*). The accused was walking very fast from the general direction of the house of the deceased. The accused was known to PW5 prior to the fateful morning. The accused did not have a conversation with PW5. The two passed each other and each went on his way. At about 8.00 a.m., PW5 was informed that the deceased had been killed and her wooden box stolen. PW5 then recalled that he had seen the accused carrying the wooden box in the morning. He informed the police. The police conducted the investigations and later recovered the wooden box and seven cups in the possession of the accused. The wooden box was positively identified by PW2 and PW4 as the one belonging to the deceased and which was stolen from the deceased on the night that she was killed. The explanation given by the accused is that he was given the wooden box, which was produced as an exhibit in the trial, by the deceased. He testified that he was given the wooden box seven months prior to the deceased's being found brutally killed.

I have evaluated the evidence adduced by the prosecution and that which was offered by the accused in his defence. The prosecution established that the accused was in the vicinity or in the area within which the house of the deceased is situate. I believe the testimony of PW5 to have been truthful. There was no reason why PW5 could have given false testimony against the accused person. No grudge existed between the accused and PW5. The accused and PW5 were known to each other but were not friends. When PW5 testified that he saw the accused carrying a wooden box at 6.00 a.m. on the 4th of November, 2003 he was telling the truth.

I further believed the testimony of PW2 when he testified that the wooden box was in the bedroom of the deceased on the 3rd of November, 2003. PW2 was the only person who used to live with the deceased. He knew the household contents in the house of the deceased. When he was asked by the police if he was aware if anything was missing in the bedroom of the deceased, he did not hesitate to point that the wooden box owned by the deceased, and in which the deceased used to keep her valuables, was missing. Similarly, PW2 had no grudge against the accused. In fact, PW2 testified that he did not see the accused prior to the brutal killing of the deceased nor on the following day. When the said wooden box was recovered in the possession of the accused, about a month after the death of the deceased, the accused did not deny that the wooden box belonged to the deceased. His explanation was that the said wooden box was given to him by the deceased as a gift. He further stated that the seven cups were given to him by the deceased as gifts.

Having carefully evaluated the above evidence, it is clear that it is the accused who killed the deceased in the course of robbing her. The accused, having worked for the deceased, thought that the deceased kept valuables in the wooden box in her bedroom. That is why there was evidence that the person who robbed and killed the deceased thoroughly searched the bedroom while looking for valuables. The accused then decided to take the wooden box and the seven cups after dumping the body of the deceased in the pit latrine where it was later recovered. The accused was seen by PW5 walking from the direction of the house of the deceased. He appeared to be in a hurry. When the accused was arrested, he did not deny that he had in his possession the wooden box belonging to the deceased. He took the police to the house of his friend called Waweru where he had kept the wooden box. I did not believe the explanation given by the accused that he had been given the said wooden box as a gift by the deceased. If the accused had indeed been given the wooden box as a gift, why did he hide it in the house of his friend Waweru and not have it in his house? It is the opinion of this court that the doctrine of recent possession applies in this case to establish the guilt of the accused on the charge of murder.

As was held by the Court of Appeal in **Faniel Mackenzie Akoyo vs Republic CA Criminal Appeal**

No.45 of 2006 (Kisumu) (unreported) at page 8;

“The doctrine of recent possession is clearly enunciated in the case of Andrea Obonyo vs Republic [1962] EA 542 and in many other decisions of this court. It is a presumption of fact and not an implication of law from evidence of recent possession of stolen property unaccounted for – See page 549 para B. Whether the doctrine applies depends on the circumstances of each and;

‘Factors such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand and the trade or occupation to which the accused person belongs can all be taken into account – (Andrea Obonyo supra – page 545 para B –C.’

In another Court of Appeal decision of Isaac Nganga Kahiga vs Republic CA Criminal Appeal No.272 of 2005 (Nyeri)(unreported) it was held at page 7 that;

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness in which the stolen property can move from one person to the other.”

In the present case, the wooden box was positively identified to belong to the deceased. In fact the accused admitted that the same belonged to the deceased. It was positively proved that the wooden box was robbed from the bedroom of the deceased on the night she was killed. PW2 confirmed that the said wooden box was in the bedroom of the deceased the day prior to the night the deceased was killed. The accused was seen by PW5 carrying the said wooden box at 6.00 a.m. on the 4th of November, 2003, a few hours after the deceased was killed. The explanation given by the accused as to the circumstances that he came to be in possession of the wooden box is not acceptable to this court. I did not believe the accused when he stated that he was given the said wooden box by the deceased as a gift.

The prosecution established that the motive of the accused in killing the deceased was so that he could rob her of her valuable possessions. He killed her in the course of robbing her. In the circumstances of this case therefore, I do hold that the prosecution established, to the required standard of proof beyond reasonable doubt that the accused killed the deceased with malice aforethought. He killed the deceased in the course of robbing her. The assessors who assisted this court during the hearing of this murder trial reached the verdict that the accused was not guilty on the grounds that the accused was not sufficiently connected to the death of the deceased by the prosecution witnesses. In the opinion of this court however, the said assessors misunderstood the application of circumstantial evidence and the doctrine of recent possession in finding an accused person guilty of a criminal offence.

I therefore find the accused guilty as charged on the charge of **Murder** contrary to **Section 203 as read with Section 204 of the Penal Code.**

The accused is accordingly convicted as charged.

DATED AT NAKURU this 27th day of November, 2006

L. KIMARU

JUDGE