



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Case 151 of 2003

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KIMANI GITAU.....ACCUSED

JUDGMENT

The accused, John Kimani Gitau 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 20th of October 2000 at Wanyororo A Farm, Bahati in Nakuru District, the accused murdered Samuel Mwangi Karuru (*hereinafter referred to as the deceased*). When the accused was arraigned before this court, he pleaded not guilty to the charge. The prosecution called a total of eight witnesses in its bid to establish its case on the charge of murder against the accused. When the accused was put on his defence, he gave unsworn statement. He denied that he had killed the deceased. Mr. Nyagaka, learned counsel for the accused made closing submissions urging this court to acquit the accused on the grounds that the prosecution had not adduced sufficient evidence to sustain the conviction of the accused on the charge of murder. Mr. Njogu, learned state counsel urged this court to evaluate the evidence on record and find that the prosecution had established its case against the accused on the charge to the required standard.

The facts of this case as narrated by the prosecution witnesses are as follows; on the 20th of October 2000, the deceased was bitten by the dog of a woman called Salome. It is apparent from the testimony of PW1 Joyce Wangare Mwangi and PW2 Mary Wangui Mwangi that the deceased was not happy that he had been bitten by the dog of Salome while he was walking on a public road. An argument ensued between the deceased and Salome. The deceased told Salome that she should lock up her dog so that it could not pose a danger to road users. Salome did not take kindly to the advice she was given by the deceased. On the following day i.e. the 21st of October 2000, the said Salome accompanied by her mother in-law by the name Eunice (*Mama Gitau*) and the accused went to the house of the deceased. It was about 9.00 a.m. According to PW2 the three asked her where the deceased was. PW2 answered that the deceased had gone to the local shop. The three sent PW2 to go and call the deceased. The deceased was the father of PW2. PW2 obliged and went and called the deceased from the shop.

Meanwhile, PW1 welcomed the three and gave them stools to sit on outside their one roomed house. After a short while, the deceased and PW2 arrived at the scene. When the deceased attempted to greet Salome, she refused to shake his hand. Salome then asked the deceased why he had attempted to beat her on the previous day. The deceased told Salome that he thought the matter had been resolved. An argument ensued between the deceased and the said Salome. Salome picked up the stool she was sitting on and threw it at the deceased. The deceased was able to deflect the stool and it fell harmlessly away.

At that point, the accused ran towards their home and came back with a spade.

The deceased had a stick with him. The accused hit the deceased with the spade. The deceased deflected the force of the spade by using a stick. He then wrestled the spade from the accused and threw it away. The accused however again picked the spade and returned to where the deceased was standing. At that point, according to PW1, PW2, PW3 Jane Muthoni, PW5 Susan Wamboi and PW6 Sarah Wanjiru, Salome picked an iron rod and used it to hit the deceased on his legs. The deceased stepped backward and his foot landed in a trench which was dug next to the fence. The deceased lost balance. It is when the deceased lost balance that the accused hit him on the chest with the blunt side of the spade. He then hit the deceased twice on the head with the sharp side of the spade.

According to the said witnesses, (*i.e. PW1, PW2, PW3, PW5 and PW6*) the deceased then collapsed and bled profusely from the wound that had been inflicted on his head. Some of the witnesses screamed and alerted the people who were in the vicinity. Some of the witnesses and particularly PW3 tried to administer first aid to the deceased. They applied salt on the bleeding wound with a view of trying to stop the bleeding. They were however unsuccessful because the injury inflicted on the head of the deceased was too deep. The deceased was then taken to hospital where he was admitted and died after a few days. After the deceased was hit by the accused, he did not talk until his death.

Post-mortem was performed on the body of the deceased by Dr. Wasike who formed the opinion that the deceased's skull had been fractured from the occipital region to the parietal region. The brain was spilling via the fracture site. She established the cause of death of the deceased to be severe head injury secondary to the compound fracture of the skull. The post-mortem report was produced on behalf of Dr. Wasike by PW8 Dr. Philip Kamau as *prosecution's exhibit No.3*. After the arrest of the accused, he was examined by Dr. Kogutu who assessed him to be mentally fit to stand trial. He however observed that the accused appeared to be a bitter person who was easily excitable. He established that the accused was suffering from depression caused by mood disorder. The P3 form was produced as *Prosecution's exhibit No.4* by PW8.

After the deceased had been assaulted, a report was made to Bahati Police Station. PW4 PC Joshua Amwayi was assigned to investigate the case. He visited the scene and was able to collect the spade and a metal pipe which were allegedly used by the accused to assault the deceased. The said spade and metal pipe were produced in evidence as *Prosecution's exhibit No.1 and 2 respectively*. PW4 testified that upon investigating the case, he established that it was the accused who had fatally assaulted the deceased using the spade. He further testified that the accused disappeared from the area after the incident and was only arrested three years after the incident.

When the accused was put on his defence, he denied that he was in the area when the deceased was fatally injured. He testified that at the material time he was a resident of Nairobi. He further denied that he had injured the deceased. He denied that the spade and the iron pipe which was produced in evidence by PW4 belonged to him.

The issue for determination by this court is whether the prosecution adduced sufficient evidence to establish the guilt of the accused on the charge of murder. In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. It is the duty of the prosecution to produce all the evidence that will establish the guilt of such an accused person. The accused person has no duty to prove or establish his innocence. In the present case, the prosecution called five witnesses (*i.e. PW1, PW2, PW3, PW5 and PW6*) who all testified that they had seen the accused hit the deceased on the head with a spade, at least twice, causing him to sustain the fatal injury. The testimony of PW1 and PW2 is particularly of importance. It gives a motive as to why the accused assaulted the deceased. They testified that the deceased had quarreled with a woman called Salome (*a sister in-law to the accused*) over a dog which had bitten the deceased the previous day.

Salome was apparently unhappy that the deceased had castigated her over her dog. She mobilized the accused and her mother in-law and led them to the house of the deceased. It is apparent that Salome was

the aggressor. She followed the deceased to his house with a view of picking a quarrel with him. In fact she was armed with a piece of metal and intended to assault the deceased. The accused became excited when the quarrel heated up. According to the said prosecution witnesses, the accused ran to their home and returned with a spade which he used to assault the deceased. The accused was so determined to injure the deceased that in spite of the deceased at first disarming him, he still persisted and eventually inflicted the fatal injury on the deceased. There is no evidence that the deceased retaliated.

The accused disappeared from the scene never to be seen for three years. He was later arrested and charged with the current offence. The doctor who examined the body of the deceased found that the cause of death of the deceased was a fractured skull which caused the brain of the deceased to ooze out. The injuries which caused the death of the deceased were consistent with the evidence by prosecution witnesses on the nature of the injuries that the accused inflicted on the deceased. The accused denied that he was at the scene when the deceased was fatally injured.

I have carefully evaluated the evidence adduced by the prosecution witnesses and the defence offered by the accused. In this case, there were five eye witnesses who saw the accused hit the deceased severally with a spade thus causing him to sustain fatal injuries. The accused accompanied his sister in-law, Salome and his mother Eunice (*Mama Gitau*) to the house of the deceased with a view of teaching him lesson on account of the insult that the said Salome perceived she was subjected to when her dog bit the deceased. It is clear that Salome, Eunice and the accused were itching for a fight.

They went to the house of the deceased and were welcomed by the wife of the deceased, PW1. They instructed PW2, (*the daughter of the deceased*) to go and call the deceased from the nearby shop. PW2 did as she was requested and called the deceased. Upon the deceased arriving at his homestead, Salome started quarreling with him. The deceased however refused to be provoked. He did not answer back Salome. It is apparent that Salome desired to provoke the deceased so that she and the accused could physically assault him.

The accused became agitated and attempted to hit the deceased with a stool. The deceased deflected the stool that was thrown at him. When the accused realized that the deceased could not be baited to fight back, he ran to his home, picked a spade and came back to the homestead of the deceased. He again attempted to hit the deceased with the spade but the deceased succeeded in wresting the spade from the accused. He threw it away. The accused retrieved the spade and went back to where the deceased was. At that moment, Salome hit the leg of the deceased with an iron rod. The deceased stepped backward in a bid to avoid being hurt by the iron rod. He slipped and fell to the ground. The accused then hit him at least twice on the head. The deceased was seriously injured. He lost consciousness. He did not recover his consciousness until his death.

From the above analysis of the facts of this case, it is clear that the accused killed the deceased with malice aforethought. This court wondered why the police did not charge Salome with the accused. She was the *agent provocateur*. She is the one who incited the accused to assault the deceased thus causing him to sustain the fatal injuries. I would recommend that the said Salome be arrested and be charged with murder. As regard the accused, he had all the opportunity to retreat and withdraw from assaulting the deceased but he was determined to injure the deceased. He formed the requisite *mens rea* to kill the deceased.

I therefore find him guilty of the charge of murder in accordance with **Section 203 as read with Section 204 of the Penal Code**. The assessors who assisted this court during the hearing of this murder trial reached a similar verdict. I agree with them. The accused is convicted as charged for murder.

It is so ordered.

DATED at NAKURU this 24th day of November, 2006

L. KIMARU

JUDGE