



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Criminal Case 50 of 1999

REPUBLIC PROSECUTOR

VERSUS

KENNEDY MIGOSI ORAO 1ST ACCUSED

HENRY HAMISI ABDI 2ND ACCUSED

ADEN A. MOHAMMED 3RD ACCUSED

RULING

KENNEDY MIGOSI, HENRY HAMISI ABDI and ADAN ABDULRAHAM MOHAMMED, were charged with the offence of murder contrary to section 203 as read with 204 of the Penal Code. The particulars of the offence were that on the 25th day of June 1998 at Septon Forest Nandi Hills in Nandi Hills in Nandi District within the Rift Valley Province, they jointly murdered **FRANCIS KAGASI IGESA**.

They appeared before the Honourable Lady Justice Nambuye on 27/1/2000, when the taking of their pleas was deferred to 15/2/2000. The trial did not commence until 7/2/2001, but it has had to be heard de novo twice due to transfer of Judges from this station. Unfortunately, **HENRY HAMISI ABDI** died during the trial and the charge was substituted to reflect that the trial would proceed against **KENNEDY MIGOSI (Migosi), and ADAN ABDULRAHAM MOHAMMED (Mohamed)**.

The State called five witnesses and it was its case that until his death on 25/6/1998, FRANCIS KAGASI IGESA (Igesa), was employed as a tea plucker in Kaboswa Tea Estate, in Nandi Hills area.

Briefly, at about 7.15 a.m. on 26/6/1999, while on her way from one area of the tea estate to another, Janepher Maziza Manyasi (PW2), who was also a tea plucker in the same farm as Igesa, was alerted by a colleague who had noticed blood; she noticed a lot of blood and an old, brown, man's left shoe. The two informed their supervisor, one Sebastian, who asked them to vacate the area until after he reported and investigated the matter. Though she later learnt that somebody's body had been discovered at about 9 a.m., she did not go to view the body. She knew Mohamed, who was a watchman at the farm, but she did not know Migosi. She however recalled having seen Migosi at the farm that morning when Sebastian came after the discovery of the blood, but she did not see him thereafter. She did not see Mohamed that morning or thereafter.

As Ezekiel Muzee Kerenyi (PW1), who was an askari in the same Estate, went about his duties, that morning he learnt that Migosi who was one of their employees, had reported to their dispensary that morning at 7.30 a.m. where he was treated for injuries sustained on both hands and fingers. He noticed

that Migosi had sustained the cut wounds; it looked like he had been involved in a fight, and upon enquiring, Migosi informed him that he had been involved in a struggle with people the previous night. He formed the opinion that Migosi had been attacked. Migosi then left for the camp to rest. While at lunch, Kerenyi was approached by Janepher (PW2), who reported that she had noticed blood and a shoe by the side of the tea farm where she had been plucking tea, which was between the tea plantation and Septon forest. He left for the scene with askaris, and upon arrival, they noticed the blood and a left side shoe. He suspected that someone had been killed, and he immediately suspected Migosi whom he had met at the dispensary that morning, he therefore returned to the camp from where he picked Migosi and took him to Nandi Hills Police Station for further investigation. Later that afternoon at about 5p.m. he went back to the scene with Migosi and two policemen and after searching the forest, they found a dead body of one of the firm's employees. The forest was about 200 meters from the tea farm. He noticed that was a little blood at that scene, where the body, which was completely naked lay. It was covered with grass. He noted that the body had cut wounds on the face, right side of the neck, throat and head. Some clothes lay by the body, and it appeared as there had been a struggle at the scene. When Kerenyi reported the matter to Nandi Hills Police Station, it was handled by No. 48906, Cpl. Samwel Awuor (PW3) who took it up as the investigating officer. He recalled that Migosi was taken to the station on 26/6/1998 at about 5 p.m., by security officers from Septon Tea Estate. Kerenyi and his team led him to the scene where Kerenyi has seen the blood. They were also accompanied by one PC Mutinda, Cpl. Nguta PW1 and Migosi. They recovered a brown, left man's shoe. He noticed that there had been a struggle. As they searched for body, they discovered the second shoe at the edge of the forest. They followed some footmarks which led to the forest, up to a point which looked 'disturbed' where after mounting a thorough search, they discovered a human body, which was covered with grass besides a big tree. He noticed deep cut wounds on the head and the neck. They left the body under guard, after which they left with Migosi for Igesa's house, whose door was locked with a blood stained padlock. They broke the door and found only one sufuria with vegetables on an unlit jiko. He testified that on 27/6/1998, Migosi led them the recovery of a panga which was the murder weapon, and a bunch of keys which were hidden in a swampy area inside the water besides the shallow river bank, 50 meters away from Kampi Chura within Septon Tea Estate; that the bunch of keys belonged to the deceased; that Migosi later led them inside the forest from where they recovered Igesa's clothes and several household goods which were wrapped with a bed-sheet after which they went to Migosi's house, from where they recovered some wet blood stained clothes which were hidden under a bed and which they carried with. They later searched Mohamed's house, but they did not recover anything. It was his evidence that that he was accompanied by PC Mutinda, and Ezekiel Kireny with his security officers at all times. He testified how he witnessed the postmortem which was conducted on 28/6/1998 at the Nandi Hills Hospital Mortuary.

Cleophas Otieno Ojode (PW4), who was attached to Government Chemist Department in Nairobi at the material time, analyzed the blood samples and several items of cloth, the panga and Igesa's padlock which had been recovered by the police, and he established that Igesa was of blood group A, while Migosi and Mohamed were of blood groups O and B respectively. Of the several items which had been forwarded to him, he observed that a piece of cloth which belonged to Igesa and Migosi's V-neck T-shirt were each slightly stained with human blood of group A; that Igesa's light blue shirt was moderately stained with human blood of group A; that Migosi's grey sleeveless jacket and the samples of soil particles were each slightly stained with human blood, but that the blood grouping results were not conclusive. He also observed that there were no blood stains on Migosi's long trousers, the padlock and the panga. He was of the view that the blood stains on Igesa's piece of cloth and on Migosi's V-neck T-shirt matched in group of blood sample of the deceased, and that the stains could have come from Igesa after injury.

The postmortem was conducted by the late Dr. Ballam. Dr. Nathan Buziba (PW5), a pathologist who is currently attached to Moi University, and who had known the late Dr. Balaam for 3 years and who was conversant with his handwriting and signature produced the postmortem form, which the late doctor had completed and signed after the postmortem on Igesa's body on 30/6/1998 at 2.30 p.m. The body which had started decomposing had 4 deep cuts on the head, 10x1 cm deep cut wound on the right side of the head, 5x1 cm deep cut wound on the forehead and 4x1 cm wound on the left eye rupturing the eye-ball, a 6 cm piercing wound on the right side of the neck, bruises around the neck and shoulders as well as on both hands and elbow joints, a cut wound of 6x2 cm deep on the throat; most of the internal organs were

not remarkable, the respiratory system was otherwise normal. Dr. Ballam had concluded that the cause of death was severe bleeding with deep cut wounds due to assault with trauma.

It is important that I evaluate the evidence that the prosecution led in this matter, for at this stage, this court is called upon to make a finding on whether each of the two should be placed on his defence. Therefore, all that is required of me is to decide whether a case has been made out sufficiently to require each of the accused to make his defence. It is important that I point out, that it must be shown that there is a prima facie case in which case, I am required to decide whether the prosecution has adduced sufficient evidence upon which this court can convict each one of them if he has no explanation to offer. I have in mind the fact that an accused person can choose to remain silent, and I am very well alive to the legal principle that the burden of proof should never be shifted to an accused person.

One of the most important ingredients of murder is malice aforethought, and it was incumbent upon the prosecution to show that these two accused had formed and that they acted upon a common intention, yet according to Kerenyi Igesa Mohamed and Migosi were friends. At no time did he receive any reports of any quarrels or fights between them, no reports had been made to the police either. Indeed he was aware that they spent a lot of time together.

But that is not all for when I review the evidence against the two, I find that it is full of contradictions, for the investigating officer gave a detailed account of how Migosi led them to the recovery of the body, murder weapon, Igesa's bunch of keys and other items. He testified how he was accompanied by his two colleagues and Kerenyi (PW1). This was very crucial evidence which tended to incriminate Migosi and it was important that it be corroborated. Unfortunately though Kerenyi, confirmed that he formed part of the search team, he did not allude to such evidence that touched on how Migosi led them to the said recoveries at all. He was a security officer and who it must be assumed knew the relevance of recording all relevant information regarding any case. The fact that he did not give evidence on those particular details meant that the court was left with the evidence of only one witness which due to lack of corroboration, it can not be relied on.

But even if I am wrong in the above findings, I found that there were glaring contradictions in the evidence for the prosecution for though PWs 1 and 2 testified how they had seen a left side shoe, the one which was produced in court was a right side shoe.

But that was not all, for PW4 confirmed that the samples which were forwarded to him a month after the incident it had been stored poorly initially, which would perhaps explain why Igesa's piece of cloth and Migosi's T-shirt were 'moderately stained' with the same blood group. Of more interest however is the fact that the body which was discovered in Septon forest by the team which was led by the investigating officer and Kerenyi, was completely naked, the body which Dr. Ballam performed an autopsy on was dressed in a grey blood stained long trousers and a white blood stained shirt. The question that comes to mind is, at what time was the body dressed, in whose clothes was it dresses and who dressed it, which brings the next question to mind, whose were the clothes which were which were forwarded as samples for analysis, and what proof is there that they were not tampered with at the Police Station?

The evidence on record indicates that there was nothing at all to link the two to the death. It is important to note that PW3 admitted that Nandi Hills was prone to thuggery at the material time. And it would beat all logic for a normal man who had just killed his friend attend the firm's dispensary for treatment for injuries sustained in the attack and Migosi's claims that they had been attacked should have been taken seriously!

Lastly, I have had serious doubts about whose death we have been dealing with during this trial. There is no doubt that a man died in Nandi Hills during the last few days of June 1998. I have touched on the fact that though the body which was recovered from Septon forest was naked, the one which Dr. Ballam handled was dressed. Secondly though PW3 confirmed that he witnessed a postmortem examination at the Nandi Hill Hospital Mortuary on 28/6/1998, Dr. Ballam conducted the autopsy on 30/6/1998.

All these issues raise serious doubts. It is trite that where there is doubt, the benefit of doubt must be given to the accused person. I form the opinion that at its face value, the evidence of the prosecution does not establish any case in law against any of the two accused, who will have the benefit of doubt in this matter.

I do therefore acquit **KENNEDY MIGOSI and ADAN ABDULRAHAM MOHAMMED** under section 306 (1) of the Criminal Procedure Code.

Dated and delivered at Eldoret this 3rd day of November 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Miss Ondo for the State

Mr. Kigamwa for the 2nd accused and holding brief for Mr. Chepkwony for 1st accused

Both accused persons