



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
HIGH COURT CRIMINAL CASE NO. 1 OF 2003

REPUBLIC PROSECUTOR

VERSUS

1. CPL. ERASTUS RABALA

2. P.C. DAVID THUO

3. P.C. CAXON MALESI

4. P.C. RAMSON MURIITHI

5. P.C. JOSEPH NJOROGE ACCUSED

R U L I N G

CPL. ERASTUS RABALA, P.C. DAVID GATHU GAITHO, P.C. CAXON MALESI, P.C. RAMSON NYAMU MURIITHI and P.C. JOSEPH NJOROGE (hereinafter referred to as Accused 1, 2, 3, 4 & 5) are 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 between the 18th day of March 2002 and 24th March 2002 in Nyeri District within Central Province they jointly with others not before the court they murdered Paul Kimani Wambiru. A total of 25 witnesses have testified before this court in proof of the prosecution case. The prosecution have now closed their case, and this court has been urged by the defence to acquit the Accused persons under section 306(1) of the Criminal Procedure Code as no prima facie case has been established against them.

The evidence for the prosecution was briefly as follows:

On 18th March 2000 John Gichuki Nderitu (P.W.2) a resident of Endarasha drove motor vehicle Registration No. KAA 066N to Nyeri where he was going to buy shop goods and new tyres for the vehicle. He met Joseph Gathiora Kariuki (P.W.4) and the deceased and sought their assistance in buying and fitting the tyres on the vehicle. P.W.2 had some Kshs.60,000/= in two bundles of 30,000/= hidden under the Driver's seat. P.W.2 noticed the deceased enter the vehicle and when P.W.2 came back to check the money he found Kshs.30,000/= missing. P.W.2 demanded the money from the deceased but the deceased denied having taken the money. P.W.2 demanded that they go to the police but the deceased took off and disappeared. P.W.2 reported the matter to P.C. Joram Mugo (P.W.25) at Endarasha police station. He was referred to Nyeri police station which was the area within which the offence was committed. At Nyeri police station he was referred to Endarasha police station to assist in arresting the deceased who was a resident of Endarasha area. Efforts to trace the deceased were however not successful

until two years later when Paul Muturi Nderitu (P.W.5) a brother to P.W.2 received a tip off that deceased was at his home.

On 18th March 2002 P.W.5 alerted the police officers at Endarasha police station. He was accompanied by Accused 3 to the home of the deceased where they found and arrested the deceased. The deceased was taken to Endarasha Police Station where he was locked in.

Samuel Wambiru Mukura (P.W.1) who is the father of the deceased visited Endarasha police station on 19th March 2002 and saw the deceased. He was then in good health and did not complain of any problem. P.W.2 talked to Accused 1 and who informed P.W.2 that an officer called Gathu was the one handling the matter but he was not in as at that time.

On 22nd March 2002 on instructions of the OCPD, Joseph Ndegwa (P.W.9) who was then the O.C.S. Mweiga proceeded to Endarasha Police Station where he was to transfer P.C. Gathu from Endarasha Police Station to Mweiga Police Station P.W.9 collected P.C. Gathu as well as the deceased who was enroute to Nyeri Police Station. The deceased was booked at Mweiga Police Station.

On the morning of 23rd March 2002 P.C. Josea Kiplangat (P.W.6) was on duty at Mweiga Police Station at 7.40 a.m. when the deceased complained to him that he was having pain in his stomach.

On 24th March 2002 on the instructions of the O.C.S. Mweiga Police Station, P.C. Mohamed Haro (P.W.7) and P.C. Ernest Njaramba (P.W.8) escorted the deceased and another prisoner called Nyongesa to Nyeri Provincial General Hospital. The deceased was complaining of stomach- ache and failure to urinate.

At Nyeri provincial General Hospital, the deceased was attended by a clinical officer Dishon Mutuku Mutiso (P.W.16) to whom he complained of incontinence of urine and epigastric pains. On examination P.W.16 made a diagnosis of peptic ulcer disease and anxiety neurosis for which he prescribed some medication. P.W.16 maintained that he did not notice any injuries on the body of the deceased.

After treatment P.W.7 and P.W.8 took the deceased to Nyeri Police Station where they reported to IP Gregory Nganga (P.W.14) who was by then the Officer in Charge Crime Nyeri Police Station. P.W.14 who noted that the deceased appeared sick confirmed from the hospital treatment notes that the deceased had been taken to hospital. He instructed that the deceased be booked at Nyeri Police Station and that the CID Nyeri who were handling the deceased's case be informed. P.W.7 therefore booked the deceased in the O.B. The deceased was then handed over to P.C. Isaiah Kiruhi (P.W.17) who noticed that he was in pain and was bending down touching his stomach. Nevertheless P.W.7 searched the deceased and placed him in the cells.

In the meantime Josphat Kimotho Mbuthia (P.W.12) and Joseph Kamau Mungai (P.W.22) who were arrested on 23rd March 2002 were also locked in at the Nyeri police station cells. On 24th March 2002 at around 4.00 p.m. they were called from the cells to take tea which a neighbour had brought them. They noticed the deceased lying down (or seated) near the table. He appeared to be in great pain. The two had their tea then went back to the cells. At around 5.30 p.m. the deceased was brought to the cells. The two witnesses contradict each other as to what the deceased said regarding his illness. P.W.12 stating that the deceased said he was tortured by the police when he was arrested, whilst P.W.22 claiming that the deceased explained to an officer who inquired what his problem was that he had a problem with his bladder and had been given medication. The deceased remained in the cells until 25th March 2002 when he complained to the O.C.S. Inspector Robert Wawire (P.W.21). P.W.21 contacted the then D.C.I.O. Mr. Ndwiga about the deceased's case, but neither the D.C.I.O. nor the other C.I.D. personnel appeared to be aware of the deceased's case. P.W.21 wanted to take the deceased back to hospital but no vehicle was available. Upon consultation between the D.C.I.O. and P.W.21 the deceased was released from the cells at around 3.00 p.m. after recording a statement.

On the same day at about 6.30 p.m. Mwangi Gathacia (P.W.15) who is a watchman in Nyeri Town, was on duty when the deceased sought assistance from him inquiring as to how he could get to the stage for

vehicles going to Endarasha. P.W.15 gave him the directions. After some time he saw the deceased come back hold onto an electric post and then collapse. P.C. Thomas Muriuki Kero (P.W.18) who was on patrol within the area, saw a crowd gathered around the deceased. He went and found him already dead. P.W.18 contacted Cpl. Mohamed Golicha (P.W.19) who was the duty officer. P.W.19 went and collected the body of the deceased and took him to Nyeri Hospital mortuary.

On 26th March 2002 P.W.1 was summoned to the office of the D.C.I.O. He reported to the D.C.I.O's office on 27th March 2002. He was later escorted to the Nyeri Hospital mortuary where he saw and identified the body of the deceased as that of his son. P.W.1 noted that the deceased had an injury on the head just above the right eye which was like a depression.

On 4th April 2002, Dr. Moses Njue (P.W.3) who was then attached to Nyeri Provincial General Hospital performed a post-mortem examination on the body of the deceased which was then well preserved. Externally Dr. Njue noted the following:

- *• A superficial bruise on the face.*
- *• A 2 cm long cut on the left outer eye margin.*
- *• Bleeding on the left conjunctiva of the left eye which the doctor associated with evidence of a blow on the eye.*
- *• A superficial bruise on the left iliac crest.*
- *• Both knees had bruises in front*
- *• The left testicle was both bruised and crushed.*

Internally Dr. Njue noted the following:

- *• Massive collection of blood in the chest cavity on both sides which he associated with fractured ribs.*
- *• Collection of fluid in the abdominal cavity*
- *• Intestines were torn*
- *• Urinary bladder was torn and had a large blood clot.*

Dr. Njue formed the opinion that the cause of death was massive blood loss due to blunt injury onto the chest, abdomen and bladder.

After this post-mortem examination the body was surrendered to P.W.1 the following day and the deceased was buried.

On 16th April 2002, the 5 Accused persons were all examined by Dr. Monica Kariuki (P.W.20) a psychiatrist then attached to Nyeri Provincial General Hospital. She confirmed that all the Accused were mentally fit to stand trial.

On 24th April 2002 at around 1.30 p.m., the body of the deceased was exhumed. P.C. Antony Kwatembo (P.W.13) an officer attached to crime scenes support services in Nyeri took several photographs of the body during the exhumation. He also took various photographs of the body at Nyeri Provincial General Hospital where another post-mortem examination was done.

On 9th May 2002 P.W.13 again took photographs during the process of yet another post-mortem examination which was done by Professor David Githongo Gatei (P.W.23). Prof. Gatei conducted the postmortem examination jointly with Dr. Nyamongo of Natioal Public Health laboratory in the presence of Dr. Njue, Dr. Gachie, Dr. Kirasi Olumbe, Dr. Geoffrey Mutuma and Dr. Emily Rugena and Mr. S.K. Njuguna an advocate for the Accused.

He noted that most of the remains in the abdominal cavity were decomposed so were the brains and intestines.

The lungs and skeletal muscles were however not decomposed beyond recognition.

Professor Gatei's examination revealed:

- *That there was no evidence of any bruises on the body apart from the bruise above the left eye and another over the chin.*
- *That there was greenish discolouration of the suprapubic abdominal muscles which was suggestive of a degenerating bruise.*
- *That there were obvious multiple rib fractures though there was no attendant penetration of the parietal pleura nor bruises in both the right and left chest walls.*
- *That there were blood clots in the blood vessels of the right pelvic muscle and additional thrombi in the pelvic muscles as well as the veins around the prostrate leading to the opinion that the thrombi could have been as a result of a trauma to the area.*

In his comprehensive 10 page report professor Gatei found the cause of death to be the following:

1. Bilateral multiple pulmonary haemorrhagic infarcts
2. Bilateral pulmonary arterial emboli
3. Pelvic venous thrombi
4. Suprapubic traumatic bruises
5. Rib fractures – though these were post mortem rather than antemortem.

Mr. Mahan who appeared for all the Accused persons submitted that no prima facie case had been established against the Accused persons as:

- *No evidence was adduced linking any of the Accused persons with the offence charged.*
- *No evidence of common intention was adduced*
- *The Accused was handled by several other officers*
- *The report of the two pathologists Dr. Njue and Prof. Gatei were contradictory.*

Mr. Orinda the Senior State Counsel on the other hand urged the court to find that a prima facie case had been established as the 5 Accused persons were the ones in charge of Enderasha Police Station from where the deceased came with pain and that the evidence of the two Doctors was consistent with the deceased having been assaulted.

The leading authority on the establishment of a prima facie case is the old case of **Ramanlal T. Bhatt v/s Republic [1957] EA 332** wherein it was stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if at the close of the prosecution's case, the case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction..... Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence” irrespective of its credibility, or weight sufficient to put the Accused on his defence. A more scintilla of evidence can never be enough nor can any amount of worthless discredited evidence It may not be easy to define what is meant by a prima facie case, but at least, it must mean one on which a reasonable tribunal, properly directing its mind to the law and evidence could convict if no explanation is offered by the defence.”

With the above in mind it is necessary to consider the evidence adduced.

First and foremost, apart from Accused 3 who is said to have arrested the deceased from his home, there is no evidence that any of the other Accused persons ever came into contact with the deceased. The only evidence implicating Accused 1 is the fact that he was said to be the O.C.S. of Endarasha Police Station. No mention is made of Accused 2, 4 or 5 nor is there any evidence as to whether they were on duty at Endarasha Police Station or the role played by any of them in the arrest and confinement of the deceased at the police station. The evidence shows that the deceased was arrested lawfully following complaints lodged by P.W.1 and P.W.5. Accused 3 and Accused 1 therefore acted within the normal course of their duties. It is further interesting to note that there was clear mention of one P.C. Gathu as the officer who was handling the case of the deceased and yet this officer was neither charged nor was he called as a witness.

Moreover the evidence adduced does not establish that the deceased sustained any injuries at Endarasha police station. This is apparent from the following:

- P.W.9 who collected the deceased from Endarasha Police Station on 22nd March 2002 and took him to Mweiga Police Station did not notice any injuries on the deceased, nor did the deceased complain to him of having been assaulted.
- The deceased's first complaint was on 23rd March 2002 while at Mweiga Police Station when he complained to P.W.6 of stomach pains.
- When P.W.7 and P.W.8 escorted the deceased to Nyeri Provincial General Hospital his complaint was that of stomach pains and inability to pass urine.
- P.W.16 the clinical officer who examined the deceased at Nyeri Provincial General Hospital on 24th March 2002 diagnosed the deceased to be suffering from peptic ulcer disease and anxiety neurosis. P.W.16 did not notice any injury www.kenyalawreports.or.ke Republic V Rabala & 4 Others [[222000000555]] e eeKKLLRR 10 on the body of the deceased nor did the deceased complain to him of having been assaulted.
- P.W.14 and P.W.7 the police officers who received the deceased at Nyeri Police Station noticed that the deceased was having pain in his stomach. The deceased did not complain to them of being assaulted.
- The only witness who claimed the deceased complained of being assaulted was P.W.12 but his evidence was contradicted by his cell mate P.W.22 who maintained that the deceased complained that he was having problems with his bladder. This was consistent with the evidence of P.W.21, the O.C.S. to whom the deceased complained about his bladder.

The evidence adduced does not therefore show that the Accused persons committed any act or omission that may have injured or caused the death of the deceased. Moreover, the Accused persons appear to have been arrested because of the report of Dr. Njue whose post-mortem examination revealed evidence of an assault. But how does one reconcile the report of Dr. Njue with the evidence of the clinical officer P.W.16 who examined the deceased on the 24th March 2002 but noticed no injuries on him? Either Dr. Njue or the clinical officer did not speak the truth.

Moreover there was clear contradiction regarding the deceased's cause of death as reflected in the report of Dr. Njue who claimed the cause of death was massive blood loss due to blunt injury onto the chest abdomen and bladder, and the report of Prof. Gatei who claimed cause of death was bilateral multiple pulmonary haemorrhagic infarcts due to bilateral arterial thrombi due to pelvic venous thrombi related to suprapubic traumatic bruises. Prof. Gatei cast doubt on the report of Dr. Njue as he maintained that the urinary bladder of the deceased was normal except for post-mortem changes, and that the alleged fractured ribs may have been postmortem rather than ante mortem.

The prosecution evidence as it stands is completely disjointed and does not reveal that a murder was committed, or that if committed it was done by the Accused persons. There is absolutely no evidence that any of the Accused persons had the intention to kill the deceased or that the Accused persons had a common intention to kill the deceased. The evidence is therefore not sufficient to convict any of the Accused persons should they elect at this stage to offer no explanation. I find therefore that no prima facie case has been established against any of the Accused persons, accordingly I acquit each Accused under section 306(1) of the C.P.C.

Each Accused shall therefore be set free unless otherwise lawfully held.

Dated, signed and delivered this 25th day of January 2005

H. M. OKWENGU

JUDGE