



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Case 161 of 2003**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**ELIJAH NDUATI and 4 OTHERS ..... ACCUSED**

**JUDGMENT**

It is alleged against these Accuseds before the court that on 6<sup>th</sup> June, 2003 they jointly with others not before the court murdered **Peter Okoyo Isaac** at Mathare slums within Nairobi.

With a view to discharge burden of proof as laid down by law, the Prosecution called eight witnesses out of who three were, what can be described as eye witnesses. I shall endeavour to summarize their evidence as it is very material to this case.

Josphat Kangethe Ndungu (PW.1) works as a matatu tout along route Nos.6 and 9. He stated in his evidence that at around 7.30 p.m. on 6<sup>th</sup> June, 2003 when he was at his home, three young people called him and asked him about a television of which he had no knowledge. They were also looking after security in the area. He was asked by them to accompany them and on the way he met a group of 30 people who led him to a bush which he identified as Kiamutisya. On reaching there, they started beating him with rungs and swords. According to him and also reiterated in cross-examination, except for one person named 'Godi' all others had put on masks on their faces. The three young men who initially approached him were not there. He also stated that the said Godi intervened and asked others not to beat him as they both were working together. PW.1 did not elaborate on how he and Godi were working together. After this intervention he was taken to a corner of a nearby house by three people. He claimed to have known them but he mentioned one name which was 'Muchiri'. He did mention a security plane having flown past but did not state what was its relevance so far as this case was concerned. Further in his testimony he stated that he was asked about the residence of one Mohamed who was his workmate. At that time two persons whom he named as Kisulu (PW.2) and Koyo were also brought there. Kisulu was left with him and other (he said one of them) was forced to go along with them. When they returned he was told he was free to go. He went to the hospital next day to tend to his injuries details whereof were not given by him. He also did not produce any documents, even P3 form, to confirm his allegations that he was beaten by the group.

In cross-examination he agreed that he heard the names while at the scene; like Muchiri, Nzagi and Nduati but later stated that he mentioned Muchiri, Godi, Nduati and Nzagi because they were at the Police Station and did not mention one Ndirangu as he was not at the Police Station. He gave different versions of people who were with him at the scene. First he said they were Kisulu and Odongo but later denied he was not with Odongo as he was the deceased. Then he stated that he was with Kisulu and Vincent Onyango, who according to him died after the event.

Even in the court, he identified 2<sup>nd</sup> Accused as Nzagi but the one he touched was 3<sup>rd</sup> Accused. He further identified 5<sup>th</sup> Accused as Muchiri who is the 3<sup>rd</sup> Accused and not the 5<sup>th</sup> Accused. He did not mention whether the person whom he named as Godi was present. He did not state who or how many left the scene with other man.

Then Joshua Kisulu Katiku (PW.2) testified and stated that, on 6<sup>th</sup> June, 2003 he was informed by two young men that Kangethe (PW.1) was calling him. He went out of his house but did not see Kangethe. He became suspicious and wanted to go back but was held by knife on his neck by those two. Other five people joined them and he was taken to Kiamutisya where he saw about 40 persons. He also saw Kangethe (PW.1) being beaten. After sometime one Vincent Onyango was brought in who died after five weeks. They all were beaten and one Yusuf alias Godi told the group to continue beating them when this witness told him he did not know the residences and numbers of other people with whom he was working. At about 11.30 p.m. he was asked to show residence of one Peter Okoyo and as he did not know Vincent was taken by them under threat of his life. They returned after sometimes and they continued beating them up to 2 a.m. when they were released. He named 5<sup>th</sup> Accused Godi 1<sup>st</sup> Accused (Nduati) and 3<sup>rd</sup> Accused (Muchiri) after he told the court that he knew all five accused persons before the court. He further stated that he saw them in moonlight and under the light of security plane which flew past. Surprisingly he stated, unlike PW.1, that only 10 persons in the group had masks. Furthermore although he stated that Vincent informed him that Peter Okoyo (deceased) died on 9<sup>th</sup> June, 2003 he did not state whether Vincent informed him what happened after he was taken by some members of the group. After this information, he informed about this incident to the Chairman of matatu owners' Association (PW.3) as well as reported the matter to the Police. In his statement recorded to the Police he agreed that he could see name of Nduati (1<sup>st</sup> Accused) but insisted he gave names of Godi and Nduati both. Even if that was so, he has not mentioned names of other three as well as has not specified how and when he saw these accused persons under the moonlight and under the light of security plane which flew past.

I also note that even if these two witnesses have given times of certain events of that night, none of them has given time when the said plane flew past. I further note that despite an apparent fact that the said Vincent was a very crucial witness to the prosecution case, no evidence of his death is put forth apart from these two witnesses cursorily stating that he died after the event. None of them has also described injuries inflicted on them as well as produced any evidence of treatment undergone by them.

PW.3 Geoffrey Wainania Chege is Chairman of Matatu Owners Welfare Association and specifically stated that on 6<sup>th</sup> June, 2003, he was informed by his supervisor one Mr. Mutinda that certain group was collecting money from all matatu workers and that three of them had not reported for duty. Pausing here, I note that as per PW.1 and PW.2 the incident occurred after 6 p.m. on 6<sup>th</sup> June, 2003. Later on he was informed that some people were attacked previous night. He went then to report and visited the deceased's house with Police. He was informed that the deceased was taken to Kenyatta National Hospital and on arrival there found him to be taken to the ward. The deceased, as per this witness was unable to talk and had cut wounds on his head and had swollen arms. He confirmed that he did not see others at the hospital even if he tried again in the evening.

He then saw PW.1, PW.2 and Vincent coming to his office. He gave them some money. But he was neither told the nature of their injuries nor mentioned whether he saw any injury on them. Although he testified that he was attacked by one of the Accused persons on 30<sup>th</sup> June, 2003 he did not identify who that accused person was.

In cross-examination he stated that the three persons (PW.1, PW.2 and Vincent) only named Godi as one of the persons in the group which beat them, none had made any complaint prior to that night or gave him names of persons who took Vincent away.

PW.4 PC Joseph Mwangi knows PW.1 and when on 9<sup>th</sup> June 2003 he saw PW.1 on reporting desk of Pangani Police Station he inquired from him. PW.1 informed him that he and his friends were attacked

by a group and that one 'Muha' had died. On him naming some of them as Ndirangu, Nduati, Godi and Zangi, he arrested last named person (2<sup>nd</sup> Accused) on 14<sup>th</sup> June, 2003. However, he did not ask for more details from PW.1 before he arrested 2<sup>nd</sup> Accused.

PW.5 PC Daniel Mugambi arrested two youths on 11<sup>th</sup> June, 2003 on information that they were collecting money from matatu owners along Routes 6 and 9. Similar arrests were made on 17<sup>th</sup> June, 2003. They were charged with offence of unlawful collection (*Sic*).

On 20<sup>th</sup> June, 2003 two of those youths arrested by him were required for offence of murder. He could only identify 3<sup>rd</sup> Accused as one of the two.

Dr. Jane Wasike (PW.7) performed post mortem on the body of the deceased and after her examination, she formed an opinion that the cause of death was head injury due to sharp as well as blunt objects.

As per Inspector Lelei (PW.8) he received report of assault on four workers from PW.3. He mentioned that PW.3 mentioned the attackers as members of Mungiki sect. None of the witnesses has

mentioned name of the said sect. He then gave details of arrests of 1<sup>st</sup> to 4<sup>th</sup> Accused. Nothing is said about arrest of the 5<sup>th</sup> Accused herein. He also stated that Identity Parades were conducted but no evidence to that effect is led by the Prosecution without any explanation.

1<sup>st</sup> Accused in his sworn testimony raised defence of alibi by stating that on 6<sup>th</sup> June, 2003 from 8.30 p.m. he was at home and denied any involvement in this offence.

2<sup>nd</sup> Accused only said in his unsworn statement how he was arrested on 14<sup>th</sup> June, 2003 when he was in a matatu. 4<sup>th</sup> Accused gave similar statement.

3<sup>rd</sup> Accused under sworn testimony raised a defence of alibi stating that he was at his homestead attending a funeral. He denied knowing either PW.1 or PW.2. He also stated that he sells old books at Kariokor Market and has nothing to do with matatu business. He, when asked by the learned State Counsel, said that he was not given any receipt for his travel to his home. He did not specify where his home was.

5<sup>th</sup> Accused in his unsworn statement stated that on 6<sup>th</sup> June, 2003 he was at home since 8.30 p.m. He recalled how on 26<sup>th</sup> November, 2003, when he was arrested he was asked whether he killed one Geoffrey Chege Wainaina (PW.3). He was then charged with offence of attempted murder. Then he was joined in with these four accused persons.

At this point it may be noted that this 5<sup>th</sup> Accused has been named as 'Godi' by all the three witnesses and although PW.3 did state that he was attacked by one of the Accused persons, he did not mention him in the court. 5<sup>th</sup> Accused has now divulged that it was he who was charged with offence of attempted murder where PW.3 was the victim or the complainant.

I have carefully considered the evidence led by the prosecution as well as that from the Accused persons. I have similarly considered the submissions made by the learned Defence Counsel and the learned State Counsel.

The case of the prosecution is based on Identification and circumstantial evidence. PW.1 and PW.2 are most relevant witnesses of the Prosecution case. I have already specified in detail their evidence and discrepancies between the two testimonies. The stark contradiction in their testimony is their evidence on numbers of people wearing masks. PW.1 said it was only 'Godi' who was not wearing the mask. But he was unable to mention that he knew him or was able to identify him and in fact identified him as one

Muchiri who in fact is 3<sup>rd</sup> Accused person. I have also carefully noted his demeanour in witness box and found him to be absolutely uncredit-worthy witness. He also said that he gave names of Muchiri, Godi, Nduati and Nzagi because they were at Police Station, but there is evidence that Godi was arrested on November, 2003.

PW.2 on the other hand named 5<sup>th</sup> Accused and identified him as Godi. But in view of the testimony of PW.1 that except for one all were wearing masks, his testimony that only 10 were wearing masks loses its credibility. Furthermore, he did not specify how and when he was able to identify which of the Accused persons. No mention of their appearance, descriptions of their clothes etc, were given.

To top these failings, even though PW.8 Inspector Lelei talked about identification parades being held, the evidence thereof is withheld without any explanation. Needless to state, that in the case which is solely based on identification by the witnesses, evidence of Identification Parade, is absolutely relevant and crucial. In its absence, I am entitled to take adverse presumption and I do take the same.

The law enjoins me to be extra cautious before accepting the evidence of identifying witnesses especially when identification is claimed to have been made under difficult circumstances as in the present case. I cannot find that the evidence on identification is free from error and thus cannot base guilt of any of the accused persons on this evidence as regards identification.

Coming to the circumstantial evidence, which is relied by the Prosecution; when evidence is led, that one Vincent was taken by some people, who are not identified, to show them residence of the deceased.

PW.1's testimony on this aspect is, to say the least jittery when he gave different names of the person who was taken by some members of the group. He also first stated it was one Mohamed whose house was required to be shown. PW.5 PC Mwangi gave his name as 'Muha' as being given by PW.1 when he came to report the matter at Pangani Police Station.

PW.2 stated that the said Vincent told him that the deceased died but there is no mention of evidence that Vincent led the same persons from the group to the house of the deceased and what happened if they reached there.

It is trite law that in the case based on circumstantial evidence,

**“in order to justify 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 the guilt”** (See **R. –V- Kipkering arap Koske and Another 16 E.A 135**).

This law has not, and cannot see any change as to standard of proof.

There are tragic gaps in the prosecution case and none of the Accused persons are seen to have been pointed at by an unwavering finger of guilt.

At the most, what the prosecution has been able to raise is mere suspicion. But it is un-assignable principle of law that in a criminal trial a conviction can only be based on the weight of the actual evidence adduced. (See **Okethi Okale and others –vs- Republic (1965), EACA 555**).

In recent **case of Mary Wanjiku Gichira –v- R. (Cr. A. 17 of 1998 – Unreported)** Court of Appeal has categorically held that suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

In absence of proper evidence as to identification, it can follow that the prosecution has failed also to prove common intention of these five accused persons and I need not dwell much on this issue as to elaborate on the law on common intention. I can only add that there is no evidence how, when and by whom the deceased was injured.

In the premises aforesaid, I find that the Prosecution has failed to prove beyond reasonable doubt that all or any of the five accused persons herein has committed the offence of murder. I therefore find that they all are not guilty of the charge leveled against them and are acquitted.

They shall be released forthwith unless held otherwise as per law.

I shall add here that the Assessors also have opined that the Accused persons are not guilty.

**Dated at Nairobi this 11<sup>th</sup> day of May, 2005.**

**K.H. RAWAL**

**JUDGE**

**11.5.2005**