



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CRIMINAL CASE 57 OF 2003

REPUBLIC.....PROSECUTOR

V E R S U S

1. WANDANGI CHEGE MWANGI

2. JAMES MWANGI).....ACCUSED

RULING

At the end of the prosecution case, it is incumbent upon the court to make a finding whether the prosecution has adduced sufficient evidence on the basis of which the court can make a finding whether the accused committed the offence or not. If the former, the court is obliged to put the accused on his defence and if the latter, to acquit him. This is a requirement of the law as contained in section 306 of the Criminal Procedure Code.

In this case, the accused were jointly charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence were that the three accused persons,

“on the night of 19th and 20th February 2002 at Maraba Estate within Kakamega Township of Kakamega District within Western Province, jointly with others not before the court murdered GILBERT MACHARIA.”

The offence of murder carries a death sentence. It is constituted where any person who of malice aforethought causes the death of another person by an unlawful act or omission. Under section 206 of the Penal Code, malice aforethought is deemed to be established by evidence proving any one or more of the following instances:-

- (a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
- (b) knowledge that the act or omission causing death will probably cause death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) an intent to commit a felony
- (d) is not relevant in this case.

The prosecution closed its case after calling a total of eleven witnesses. What emerged in the evidence adduced by the prosecution showed that the deceased, GILBERT MACHARIA, was on the night of 19th and 20th February 2002 sleeping in a house in Maraba Estate, in Kakamega District, where he lived with his wife, JANET WANGARI MACHARIA (PW1). In the house, besides his wife, were the deceased's daughter and son, WANJIKU and RUIDICK MACHARIA respectively, and the latter's three children, Hiram, Maina, and Wanderi. The house was four roomed. The deceased was in his room and his daughter and wife in different beds in one room. The house had security lights and the outer door was wooden.

The security lights were on. At 2.00 a.m., that night, PW1, saw flashes of torches outside the house and suddenly dogs started barking in the neighbourhood. She called her daughter Wanjiku. She put off the security lights to warn that they were not asleep. But immediately the security lights went off the wooden door to their house was hit with a stone. PW1 heard people talking outside and a voice asked twice in Kiswahili "where is the old man's house?" She was terrified. She went to the door and held it from the inside and asked who it was. She was ordered to open but she refused. The door was broken. A gang which had big torches entered. She was ordered to bend down and not to look at them. It was dark. They demanded money but got none. PW1 had recognized the voices of accused No. 2 and Accused No. 3 as they spoke outside the house. Some of the gang members entered the house while others remained outside. They took the deceased outside and when they left, they took him with them. PW2, Margaret Wanjiru Wathiong'o, a daughter of the deceased, had just arrived home with her husband, Thiong'o on the night of 19th/20th February 2002. PW2 lived in Maraba Estate not far from the house of PW1.

PW1 with her son and daughter and the latter's three children immediately left their house and went to the house of Margaret Wanjiru, who with her husband, Thiong'o, offered them assistance by taking them to another neighbour, Dr. Wafula, who offered them a vehicle which took them to Kakamega Police station. The police looked for the deceased but did not find him.

The first accused, Wandangi Chege Mwangi, has married the sister of PW1 and is therefore PW1's brother-in-law. He was PW1's neighbour at Maraba Estate, Kakamega, during the night of 19th/20th February 2002. The 3rd Accused, Francis Kabuge Mwangi, is the son of PW1's brother and is therefore PW1's nephew. He was also PW1's neighbour at Maraba. The 2nd Accused, James Mwangi, is the son of the daughter of the brother of PW1 and is therefore PW1's grandchild. The mother of Accused 2 was called Waithera. She died in Kakamega General Hospital in February 2002. She had been in hospital for a long time. Accused 2 accused the deceased of having killed his mother. Waithera's home was not far from the deceased's home. It was the evidence of PW1 that Accused 2 alleged that his mother's body would not be removed from the mortuary before the body of the deceased had been taken there. The deceased was accused by Accused 2 of being a witch.

In her evidence, PW1 also stated that she had told her daughters, Wanjiru and Margaret w/o Thiong'o, that she had recognized the voices of Accused No.2 and Accused No.3 among the gang that abducted her husband but she omitted to tell this to the police officers who went with her to the scene but while recording her statement she told this to the police officer recording her statement. Earlier in the day on which the deceased was abducted and fatally injured, that is to say 19th February 2002 the 2nd accused was heard by PW1 in PW1's home saying that he would harm the deceased. The deceased who was present was worried about the threat to his life and told the village elder, Shaban Sakwa Hamisi (PW3), about it on the same day.

Waitherero was the first daughter of the 1st accused and the mother of the 2nd accused. She was sick on 10.2.02. She was at home. On 13.2.2002 she died at home. Mourning started. Her body was taken to the mortuary at Kakamega Provincial General Hospital.

On 10.2.2002, PW2 was in her house at 1.30 p.m. when a neighbour, Andrew Mbatia who had sold land to PW1's parents went to her house in company of a lady who was the mother of the village elder. They warned PW2 that they had been a feud between the 1st accused and PW1's parents and that PW1's father, the deceased, was being accused by Accused No.1 of having bewitched Virginia Waitherero, the 1st accused's daughter. PW2 was warned that if Virginia Waitherero died, then somebody in the family of PW1 would die. Andrew Mbatia told PW2 that his son, Alfred Mbatia, was beaten by the family of the 1st

accused because, it was alleged, he delivered drugs to Virginia Waitherero at the behest of the deceased. PW2 was requested to report to the police the threats made by accused No.1. PW2 with her mother, PW1, her husband, Thiongo, and George and a neighbour saw at 6.00 a.m. the deceased after the school children reported to them that they had seen the deceased. He had been abandoned by the abductors with severe injuries. PW2 said in evidence that the deceased had very severe injuries. His left hand had been cut and the right leg had four cuts while the left had three cuts. He was alive but weak. He spoke. He told PW1 in Kikuyu that the family of PW1 had “finished” him. He did not mention the names of PW1’s relatives who had abducted him and inflicted the injuries on him. He was stark naked and had bled a lot. She said that the deceased told her and her companions that four men had abducted him and that two of them spoke Nandi while the other two spoke Kiswahili. He died later at Kakamega Provincial General Hospital without naming the abductors.

Cross-examined by Mr. Athunga, learned counsel for the accused, PW2 said that her mother, PW1, had recognized the voice of one member of the gang that abducted the deceased and that she did not tell the police that her mother (PW1) had recognized the voice of one of the gangsters nor did she tell the police that her father, the deceased, had received threats on his life. But PW2 had told the lady Inspector, IP.Regina Musoka alias Regina Shamalla, about the threats on the night of 19/20 February 2002 while at Waitherero’s house but the matter was not taken up at the police station. PW2 stated that the four police officers who went to the scene where the deceased was found did not bother with investigations and PW2 and her family were compelled to complain to the D.C.I.O. who assigned other officers to the case. For instance, she said when they went with a police dog to the house of Accused No.1. They did not interrogate Accused No.1 nor did they enter the house to find out who were there. They failed to follow the leads. In his evidence PW3, Shaban Sakwa Hamisi, the village elder of Maraba B village, told the court that the deceased had reported to him on 19th February 2002 at about noon that he had a sense of foreboding that his life was in danger and he feared he might be killed any time. PW3 also testified that on 10.2.2002 at 8 p.m. Alfred Shikasia Mbat (PW4) reported to him that Accused No.1 claimed that he (Alfred) was practicing witchcraft and soon thereafter a lady known as mama Omega informed him that somebody was being killed in the house of Accused No.1. PW3 went there and found Accused No.1 who barred him from entering the compound and locked the gate. PW3 jumped over the gate and got into the compound. There was a crowd of people gathered outside the gate. In the compound, he found Alfred (PW4) with his hands tied on his back. The latter told him that Accused 1 alleged that he practiced witchcraft and was being used by the deceased to bring witchcraft to the daughter of Accused No.1, Waithero. Alfred had been grabbed on the road by Alice Wambui, sister of accused No.2, and forced into the latter’s compound. PW3 called the police and when they came Alfred was rescued. PW3 saw the door of the house of PW1 which the abductors had broken with stones.

Alfred Shikasia Mbat PW4 told the court in his evidence that the 1st and, 2nd Accused and the wife of 1st Accused beat him mercilessly because they suspected he was being used by the deceased to deliver charms to Waitherero, the daughter of Accused 1 who was the mother of Accused 2.

Regina Musoka, PW6, also known as Regina Shamalla visited the house of PW1 on the night of 19/20 February 2002 in company of PC Mwangi,(PW10), a dog handler. The dog led them to the house of the 1st Accused.

Bernard Utatura (PW8) was employed by the 1st accused in their butchery business helping Waitherero but when she fell sick, the 2nd accused took over the management and became his boss. On 18.2.2002, when PW8 was in a funeral meeting in the home of Waitherero, deceased, the 2nd Accused who was livid stated in his hearing that he would not bury his mother, Waitherero, when the deceased Gilbert Mwangi, was still alive. There were other people in the meeting who heard Accused 2 say so, he said, and PW8 and others tried to calm Accused 2 down. A friend of Accused 2, one Zacharia was seen by PW8 in the meeting and he disappeared alone and came back at 4.00 a.m. on the night of 19/20 February 2002 and went straight to the house of Waitherero where the said Accused was. PW8 saw Zacharia again leave and go away. Soon after, the police, in company of PW1 and PW2 and PW3, came with the dog and the dog handler, PC Mwangi (PW10). On 13.3.2002 PW8 was going to record a statement at Kakamega Police station. He first went to Bunyore Bar and while there, the 3rd Accused Zacharia, Accused 2’s friend, upon learning he was going to record a statement with the police regarding

the deceased, told PW8 to forget it and instead go home. As he headed home, the village elder caught up with him and got him to go to the police station where he (PW8) recorded a statement.

PC Joseph Mwangi (PW10) was a dog handler. His dog was called

“HAWK”. It accompanied him and PC Muturi and a driver. The dog led the team to the home of Accused 1 whose daughter Waitherero had died. The dog barked at and identified Accused No.1 and PW10 flashed a torch at him and ordered him to walk out and withdrew the dog and commanded it to stop barking. There were many mourners in the home. Accused No.1 refused to comply with the order to step out. The duty officer, Regina Musoka alias Regina Shamalla, and Crime standby PC Peter Muturi talked to Accused 1. PW10 did not know what was discussed. Then they left.

PW11, PC Aggrey Mungasi took over the investigations. He arrested 5 suspects. These were the present three accused and David Nangilo Karani alias Tausi and Zacharia Imbayi and Enock Yeswa Musungu. They were charged with murder but the case was withdrawn on the advice of the Attorney General who subsequently gave directions for the five accused to be rearrested and charged again. The present accused were rearrested but the other accused are still at large. PC Peter Muturi (PW9) handed over investigations on the case to PC Mungatsia of C.I.D. before the accused had been arrested

Dr. Geoffrey Wechuli, (PW7), produced the Post Mortem report of the deceased showing the deceased died due to cardiopulmonary arrest secondary to external haemorrhage. He noted the deceased had traumatic amputation of the left hand, deep cut wound on right thigh, bilateral cut wounds on lower legs. He also produced PW3 forms for the Accused certifying that they were fit to stand trial.

The evidence adduced in this murder case was circumstantial. In cases where the evidence is circumstantial the test applicable before an inference of guilt on the part of the accused is made is that the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. This was the ratio decidendi in **Simon Musoke v. Republic (1958) EA 715**. In the present case, the inculpatory facts are to be found in the evidence of the eleven witnesses. Firstly, there is evidence that the accused had a motive to cause death of or to do grievous harm to the deceased. The 1st and 2nd accused were heard as stated earlier threatening the deceased with death because they suspected him of practicing witchcraft and to have been responsible for the illness and subsequent death of Waitherero, the daughter of the 1st accused and the mother of the 2nd accused. There is evidence that the accused had brutalized PW4 because the accused alleged he run errands for the deceased whom they suspected to have delivered drugs on his behalf. The village elder, PW3, gave evidence that confirmed this beyond doubt. PW8 who was a worker in the 1st and 2nd Accused's butchery heard the accused swear they would harm the deceased. Accused 2 in particular swore that his mother Waitherero would not be buried before the body of the deceased had been taken to the mortuary.

Further, PW1, the wife of the deceased, recognized the voices of the 1st and 2nd accused on the night of 19/20 February 2002 outside her house just before the gang broke into her house and abducted her husband. Voice identification is receivable and admissible in evidence. In **Dishon Litwaka Libanbula v. Republic Kisumu C.A. Criminal Appeal No. 140 OF 2003 quoting Choge v. Republic(1985) KLRI the court stated the law thus:-**

“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it, and recognized it, and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it.”

The evidence of voice identification of the 1st and 2nd accused was reinforced by the evidence of PW10, the dog handler, who testified that HAWK, the dog, had led him and his team to the 1st accused at whom it had barked and identified on the night the deceased was abducted. When PC Aggrey Mungasi (PW11)

took over investigations of the case, he put together all the evidence and caused five persons who included the present accused to be charged with the murder of the deceased. The Attorney General withdrew the case and after studying the file which he had called for, gave directions for the five persons to again be charged with murder of the deceased. However, two of the initial five suspects went underground and have hitherto not been found. The present accused were rearrested and charged in this case.

In my view, an inference of guilt can be drawn against the accused because the inculpatory facts in this case are incompatible with their innocence and are incapable of explanation upon any other hypothesis than that of their guilt. I put the three accused on their defence.

Dated at Kakamega this 24th day of June, 2005.

G. B. M. KARIUKI

J U D G E