



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**CRIMINAL CASE NO. 58 OF 2004**

**GEORGE IHUGO MWAURA .....**  
**APPELLANT**

**-VERSUS-**

**REPUBLIC .....** **RESPONDENT**

**J U D G M E N T**

The accused person is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the charge on count are that on the night of 28<sup>th</sup> and 29<sup>th</sup> April, 1995 at Ngarariga Village in Kiambu District of the Central Province, murdered Tabitha Mumbi Ihugo.

The particulars of the charge on count 2 are that on the night of 29<sup>th</sup> April 1995 at Ngarariga Village in the Kiambu District of the Central Province murdered Nancy Mugure Ihugo.

The prosecution called 4 witnesses in support of its case.

**PW1 No. 217251, Superintendent Shadrack Maitha, Maitha** attached to Tigoni Police Station recalled that on 8<sup>th</sup> May, 1995 at about 8.00 p.m. a suspect was brought to his office by Constable Arigi and booked with the offence of murder. He recorded the statement of the suspect.

**PW2 No. 47284: Corpral John Arigi, Arigi**, recalled that on 20<sup>th</sup> April, 1995 he was on duty as a stand by. He received a report from the personnel at the report office that one by the name Ihugo had murdered his two young daughters. He informed Inspector Kariuki about the matter. He proceeded to the scene and found the wife of Ihugo in a two roomed timber house in the company of some other women. She [Ihugo's wife] led them to the bedroom where the two deceased were. According to this witness, the two deceased were lying side by side in the bed-room. Close observation disclosed bruises on the skull and bleeding from the ear and mouth. While at the scene a neighbour by the name Njuguna gave him a sword and iron bar which he [Njuguna] claimed to have snatched from the accused in the process of chasing his wife away. The scene of crime personnel came and took photographs. Thereafter the bodies of the deceased were escorted to City Mortuary. Later on he accompanied relatives of the deceased at the time post mortem was done. Subsequently, the bodies were released to the said relatives for burial.

On 29<sup>th</sup> April, 1995, while at the report office, accused was brought at the station by members of the public who claimed to have arrested him at Ngarariga Trading Centre. He re-arrested the accused while in company of P.C. Kasavulli and put him in the cells. The accused then offered information regarding the whereabouts of the axe in the house. He positively identified two the accused in court as the person who

was brought by members of the public.

**PW3, Peter Ndungu Mwaura, Mwaura**, stays in Naivasha. On 4<sup>th</sup> May, 1995 he received information that his brothers children were dead. He came home, went to Tigoni Police Station whereat he was given a police officer who accompanied him to the City Mortuary. At the said mortuary he identified the two bodies for purposes of post mortem. He was in the company of brother in law of accused. After post-mortem the bodies were released for burial. He gave the name of the deceased as Tabitha Mumbi and Nancy Mugure.

**PW4, Dr. Samuel Odera Ywaya, Ywaya**, a retired pathologist recalled events of 4<sup>th</sup> May, 1995 at City Mortuary. He performed post-mortem on the body of Tabitha Mumbi. As a result of the examination he formed the impression that the cause of death was brain hemorrhage due to cerminated fractures with fragments in the right side paratial region. He opined that the injuries were consistent with a blunt object.

On the same day he performed a post-mortem on the body of Nancy Mugure. As a result of his examination he formed the opinion that the cause of death was bleeding of the brain due to fracture of the left side paratial region. He opined that the injuries were consistent with a blunt object.

At the close of the presecution case, Mr. Onalo for the defence submitted that there was no evidence connecting the accused with the death of two of his daughters.

That Njuguna who allegedly received the suspected murder weapon and the wife of the accused who would have shed light on the circumstances of death were not called to testify in the proceedings.

That in the circumstances the evidence connecting the accused with the alleged offence are purely circumstantial. That the prosecution has not passed the acid test of circumstantial evidence that would sustain a conviction.

The accused opted to keep quiet when put on his defence.

I have carefully evaluated the evidence on record. It is trite law that the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent. That where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution (See *BUKENYA & OTHERS -VRS- UGANDA* [1972] E.G. 549. In this case the evidence tendered so far is barely adequate. In the circumstances, I am constrained to make an inference that the evidence of the said uncalled witnesses would have tendered to be adverse to the prosecution.

In the void created by failure to call the eye witnesses aforesaid the only evidence available is purely circumstantial.

That evidence does not irresistibly point to the appellant to the exclusion of all others within the meaning of *R -vs- KIPKERING & ANOTHER* 16 [1949] EACA 135 where it was held thus:

“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 guilt”

The accused allegedly gave Njuguna a sword and an iron-bar which he (Njuguna) claimed to have snatched from the accused in the course of chasing his (accused's) wife. The wife of the accused was equally allegedly chased away by the accused before the commission of the offence. The accused stand suspected of having committed the heinous crime. That suspicion may be strong but this is a game with a clear and settled rules of engagement. The prosecution must make out a prime-facie case at this stage to warrant the accused being put on his defence.

As said earlier on, in order to justify guilt, the inculpatory facts must be incompatible with the innocence

of the accused and incapable of explanation upon any other reasonable hypothesis other than that of guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remain with the prosecution (See JOAN CHEBII SAWE -vs- REPUBLIC. C.A. No.2 of 2002) (C.A). This burden, in my view, has not been discharged in this case.

Accordingly I enter a verdict of “NOT GUILTY” in accordance with the provisions of Section 306 [1] of the Criminal Procedure Code.

The accused is set free unless lawfully held for some other lawful reason.

DATED at NAIROBI this 20<sup>th</sup> day of July 2005.

**N. R. O. OMBIJA,**

**JUDGE.**