



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Case 136 of 2004

REPUBLIC APPLICANT

VERSUS

STEPHEN KAHENYA NDUNGU & FOUR OTHERS ACCUSED

JUDGMENT

Five Accused persons before the court are jointly charged with an offence of murder contrary Section 203 read with Section 204 of the Penal Code (Cap.63 Laws of Kenya). They are alleged to have jointly murdered John Murigi Kingu (the deceased) on 3rd August, 2004 at Nyanduma Village in Kiambu District, Central Province.

It is on record that 1st Accused was employed by the deceased as a worker in his farm where deceased was staying with his wife, Salome Wanjiru (PW.1). The 1st Accused also had a sleeping quarter in the same house. It is similarly on record that 3rd Accused was deceased's uncle and 5th Accused is said to be his cousin and who was staying at the same homestead as that of the deceased.

It has not come out from the Prosecution case as to how 2nd and 4th Accused persons are related to the deceased or any of the Accused persons. Moreover no witness has referred either of them in their evidence. It was only said that they were arrested after 1st Accused was arrested.

In my view I can and shall find that there is no evidence against 2nd and 4th Accused persons. Thus I enter finding of not guilty and acquit them of the offence of murder of the deceased as leveled against them. They be released forthwith unless held otherwise as per law.

I do differ when I give the said finding from the opinion of the Assessors simply because they placed burden of proof of their innocence on the two. They stated that because they did not give their defence they were scared lest they be implicated. Obviously they misdirected themselves when giving an opinion that 2nd and 4th Accused persons had common intention with 1st and 5th Accused persons to commit the crime when there is no evidence at all against either of them.

The primary ingredient of an offence of murder, i.e. death of the deceased, is sufficiently proved by the prosecution. The body of the deceased was exhumed in full view of police officers, family members and other villagers at the scene on 6th September, 2004 after PW.3 Anthony Miringu Kangu identified the body to him. The Post Mortem report was allowed by the court to be produced by Cpl. Tom Kisa Olodi (PW.7) after successful application from the learned State Counsel under Section 77 read with Section 33 of the Evidence Act. (Cap. 80 Laws of Kenya). The cause of death as per the report was sharp penetrating wound on the back of head/spinal cord column. Obviously it can be deduced from the nature of injury that the injury was inflicted from behind.

The case of the Prosecution rests mainly on evidence of wife of the deceased Salome Wanjiru (PW.1) corroborated by other evidence which shall be observed hereinafter.

According to her on 3rd August, 2004 she was sleeping with the deceased at their home in Nyanduma village. At around 3 a.m. she got up and went to toilet, which was outside their house. While returning she saw 1st Accused roasting maize in their kitchen. She asked why was he up till that late. The 1st Accused did not respond and she took one maize which was roasted by 1st Accused and shared with the deceased. The deceased also got up and brought back another maize which they also shared. After some time 1st Accused called the deceased to come out as he was wanted by 5th Accused. The deceased was wearing a green vest, shorts and sleepers when he went out after the said call. She went back to sleep and got up around 6.00 a.m. but did not find the deceased on their bed. She thought of asking 1st Accused but when he met her, he informed her that he had escorted the deceased to Nairobi and that he would be back on 8th August, 2004. When she asked him how the deceased could have gone to Nairobi in the clothes he was wearing, she was told by 1st Accused that he borrowed clothes from 5th Accused.

I do note that she was not questioned on veracity of her evidence as to what transpired between her, the deceased and 1st Accused that material night. What she was asked was whether she heard any noise or struggle or commotion. She was also asked whether there was any dispute between the deceased and 5th Accused, to which she replied she was not aware of any. She also specified that the 1st Accused refused to accompany her to inform Deceased's brother about the deceased being missing after the deceased did not come back home. But she informed the brothers later and also reported the matter.

It seems that deceased's brother PW.2 Peter Gitau Kungu could not do much after receiving information from PW.1 as the family was depending on another brother Anthony Miringu Kungu (PW.3) who is an Advocate of High Court of Kenya at Nairobi.

What PW.2 however testified which is relevant, is that at Karaya village after 9th August, 2004, he saw 1st Accused wearing clothes of the deceased and when he wanted to report the same to the Chief he was prevailed upon not to do so by 5th Accused on the ground that 1st Accused was an orphan. He also testified that after that incident 1st Accused promised to go with him to Nairobi to see PW.3, but 1st Accused did not come and he went alone. This fact is also corroborated by PW.3 who stated that when 1st Accused called after being told to do so, he agreed to come the next day with PW.2, but he did not and PW.2 came on his own. After that PW.3 became suspicious and took actions. His sister Purity who was sent by him to find out what was the position, to reported him that 1st Accused was not at the farm. Police then were involved after he confirmed to them the report made by PW.1 that the deceased was missing since 3rd August, 2004. The search was mounted after mobilizing people to comb surrounding areas.

On 5th September, 2004 a depression was dug on their farm but nothing was found. At that time, when they were about to abandon the search, 3rd Accused pointed another place at the farm which had loose/soft top soil. The place was dug and foul smell emitted. The scene was preserved as it was getting dark.

On 6th September, 2004 the said place was dug and the body of the deceased, wearing the same clothes described by PW.1, was exhumed.

On 7th September, 2004 on information 1st Accused was arrested. From his house deceased's ATM card and passport were recovered (Ex.2 and Ex.3). After his arrest all other Accused persons were also arrested and then jointly charged with this offence.

I pause here and have to note that no questions on his arrest or recovery of exhibits from his house were asked. In short these facts were not contested. Similarly evidence of PW.2 to the effect that he saw the 1st Accused wearing deceased's clothes and that he was prevented by 5th Accused to make report is also not challenged. These facts thus do remain uncontroverted.

The police witness PW.7 Cpl. Tom Kisa Oladi testified as to the search and how the body was exhumed. He also talked about visit to the 1st Accused's home and recovery of Ex.2 and Ex.3 belonging

to the deceased from that house. It may not be thus necessary to detail his evidence as it does not add to what I have observed earlier, except to reiterate that this witness also was not questioned on the recovery of those exhibits from 1st Accused's house. With no eyebrows having been raised on that relevant evidence I shall have to accept them as uncontroverted. The evidence is consistent and I do not have any reason not to accept the same as credit worthy. I also further observe that the 1st Accused in his unsworn statement also has not touched on any of those facts which are posited by the Prosecution witnesses. Thus I am fortified to accept the said facts as true.

As against these 1st Accused in his unsworn statement simply said that on 3rd August, 2004 he worked at the farm, had supper with the deceased and his wife and went to sleep.

Next day he did the same. But the day next to the same when he returned home he did not find anyone. He lived there till the food in the house got finished and then went to another place to work.

On 7th September, 2004 he was asked to accompany five people, whom he met, to the office of sub-chief. He was arrested there and eventually was arraigned before the court on 28th October, 2004 from Kiambu Police Station.

3rd Accused testified under oath that during middle of August, 2004 he was informed by brother of the deceased and others that the deceased had gone missing. He asked them to fix a date when they could mobilize people to search.

On 5th September, 2004 on getting information from his son that depression was located in deceased's farm, he went there. When people were about to abandon the search on not finding anything on that spot he was called aside by one Mama Mburu and Mama Josphat that they had noticed a place nearby with loose/soft top soil. He in turn informed Cpl. at the scene and the body was exhumed from that place. He emphasized that he was like a father to the deceased and deceased also respected him as such.

5th Accused also gave sworn testimony. He denied any knowledge of the killing. He stated that on 3rd August, 2004 he went to a neighbouring village, which was not named, to do electrical work. On his return he ate supper prepared by his younger brother and slept.

He also narrated what happened on 5th September, 2004 and how the body was exhumed and removed on 6th September, 2004. He was secretary to the funeral committee and was arrested on 7th September, 2004 at around 12.00 p.m. and thereafter charged with the offence along with others four before the court.

I shall start with the case against the 3rd Accused person. From the record it clearly emerges that he was arrested simply because he pointed the place underneath which the body of the deceased was buried. There is no other evidence to link him with this murder. In his sworn testimony which was tested by cross-examination, he has explained how he came to know about the place with soft top soil. That explanation is plausible and could have been true. Moreover it is agreed by PW.7 Cpl. Oladi, that 3rd Accused was arrested on obtaining information from 1st Accused after his arrest. That cannot be the basis for attaching any guilt to 3rd Accused simply because it tantamount to uncorroborated evidence of a co-accused. This finding creates reasonable doubt in court's mind and the benefit thereof has to be given to him.

I therefore enter a finding of not guilty against the 3rd Accused and acquit him of the offence of murder of the deceased. He also be released forthwith unless held otherwise as per law.

This leaves me with the case against 1st and 5th Accused persons.

I shall start with that against the 1st Accused. I have already observed that in absence of any other evidence to the contrary, I shall have to accept the evidence of PW.1 and PW.2 as regards involvement of 1st Accused on the night of 3rd August, 2004 and thereafter. No doubt is raised on testimony of PW.1 that it was him who called the deceased out of his home, it was him who told PW.1 that he had escorted the deceased to Nairobi and that the deceased had borrowed clothes from 5th Accused. This fact itself is

sufficient to prove the involvement of this Accused in the matter.

The evidence does not stop here. PW.2 sees the 1st Accused with deceased's clothes and his disappearance from the farm after that. The deceased's ATM card and passport are recovered from his house. His defence has not put any dent in the evidence led by the prosecution, on the above mentioned relevant facts against him.

I am aware that the case against 1st Accused is based on circumstantial evidence and I have to satisfy myself that inculpatory facts are incompatible with innocence of the Accused and incapable of any explanation upon any other hypothesis than that of the guilt.

I do find so and also find that the circumstances before the court do produce moral certainty to the exclusion of every other reasonable doubt. {See **R. v. Kipkering Arap Kosge 16 EACA 135 and Simon Musoke v. R. (1958) EA 715**}.

The evidence against 5th Accused also is sufficiently detailed by me. According to PW.1, 1st Accused asked the deceased to come out as 5th Accused wanted him. It is also true that after that the deceased was not seen and his body was found after more than a month. She was not questioned on the veracity of what she heard. She was, as I had earlier stated, asked whether she heard any commotion or noise outside the house, which she said she did not. I have also observed that the injury on the deceased was at the back of neck/spinal column and thus it has to be inflicted from behind. The question of struggle in that position may not arise.

Be that as it may, even the evidence by PW.2 that 5th Accused prevented him from reporting 1st Accused to the authorities when he saw the 1st Accused wearing deceased's clothes, also has remained uncontroverted. I am aware that there is no direct evidence against the 5th Accused but these two pieces of evidence under the circumstances, in my humble opinion, were enough to connect the 5th Accused with the 1st Accused and the offence.

His defence of alibi has failed to raise any possibility of being probable. I do reject the same in the premises.

The upshot of all aforesaid is that I enter findings of guilty against the 1st and 5th Accuseds and do convict them of the offence of murder of the deceased as charged.

As there is mandatory sentence as per Section 204 of the Penal Code, I sentence both i.e. 1st and 5th Accused persons to death as prescribed by law.

Right of appeal within 14 days.

I have already directed hereinbefore to release 2nd, 3rd and 4th Accused persons unless they are held otherwise as per law.

Dated and signed at Nairobi this 20th day of December, 2005.

K.H. RAWAL

JUDGE

20.12.05