



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
HIGH COURT CRIMINAL CASE NO. 127 OF 2003**

REPUBLIC..... PROSECUTOR

VERSUS

1. DANIEL GATHUMBI NDIYA

2. JOHN MUCHIRI GATHUMBI

3. BENSON CHUNI GATHUMBI ACCUSED

J U D G M E N T

Daniel Gathumbi Ndiya, John Muchiri Gathumbi and Benson Chuni Gathumbi (hereinafter referred to as the 1st, 2nd and 3rd Accused) were charged jointly with three others with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. It was alleged that on the 26th day of October 2003 at Kamakwa village in Murang'a District within Central Province they jointly murdered John Maina Kamau. Nine witnesses testified for the prosecution. Briefly their evidence was as follows:

On 26th October 2003 at 6.00 p.m. John Maina Kamau (hereinafter referred to as the deceased) visited his Aunt Abigail Mugure Gachara (PW 8) at her house in Kamakwa village in Kiruri location of Kangema Division. The deceased stayed with his Aunt until 8.30 p.m. when He left. That was the last time the deceased was apparently seen alive.

On the same night of 26th October 2003 at about 8.00 p.m. David Kamau Matheri (PW 3) went to Kamakwa where He bought batteries. He could not however leave the shops immediately since it was raining heavily. He waited for about 3 hours after which He borrowed an umbrella from one Lilian. Thereafter He started walking home.

On the way as he was walking he met a man whom, he saw clearly using his torch and identified as Daniel Githumbi (1st Accused). He passed him and about 20 metres ahead he met two people carrying a load in a sack sagging over their shoulders. One of the men greeted P.W.3 and he recognised the voice as that of John Muchiri (2nd Accused). The point at which He met the two men was just near the home of 2nd Accused. P.W.3 noticed after passing the two men that they branched into the home of 2nd Accused with 1st Accused following them behind while flashing his torch illuminating the way for them.

On 3rd November 2003 news of the disappearance of the deceased who was still missing went round the village. A search was immediately mounted for the deceased, and all the villagers were mobilized to participate. On 7th November 2003, while the search was still continuing, P.W.3 met 2nd Accused at Kanyenyaini. P.W. 3 asked 2nd Accused why He was not participating in the search for the deceased. 2nd Accused who was drunk told P.W. 3 that his father had a grudge against the deceased over land and that they had killed the deceased and buried him in a house. On the same day P.W. 3 reported this information as well as his encounter with 1st Accused, 2nd and 3rd on 26th October 2003 to P.W. 5 Amos Kimani

Kirikiri a former assistant Chief.

The next day, P.W. 5 relayed the information received from P.W. 3 to John Matheri Mukono (P.W. 6) the assistant chief of Kiriri sub-location and Inspector Joseph Muli (P.W. 9) an officer attached to Kangema police station. On the same day i.e. 8th November 2003 P.W. 9 with the assistance of P.W. 6 arrested 2nd Accused and 3rd Accused. P.W. 9 then escorted 2nd Accused to his house accompanied by Samuel Kiiru Kamau (P.W. 1) a brother to the deceased.

In the presence of P.W. 1, P.W. 5, P.W. 6 and P.W. 9, 2nd Accused produced keys to the house and P.W. 6 opened the door. The police dug the floor of the house and found a body which was covered in polythene buried inside the house. The scene was preserved and scenes of crime personnel contacted. P.C. Albert Kiarie (P.W. 4) of the scenes of crime went to the scene on 10th November 2003 and took photographs showing various views of the scene, the grave where the body was buried and the body which was covered with a gunny bag and tied with a rope. The photographs were produced in court as evidence. The body was exhumed and taken to Murang'a Hospital mortuary.

On the same day 10th November 2003, P.W. 1 identified the body to Dr. James Njeru (P.W. 2) who was then attached to Muriranja sub-district Hospital as the body of his missing brother. Dr. James Njeru performed a post mortem examination on the body in the presence of Dr. Moses Njue a representative of the family. P.W. 2 noticed that the body was partially decomposed with a tight rope around the neck and a white sack covering the head. The face was swollen and large gaping fractures were evident on the forehead. The brain was exposed and rotten and the tongue protruding out of the mouth. P.W. 2 formed the opinion that the deceased died from head injuries caused by a massive blunt force on the forehead. There was also simultaneous suffocation. He could not however determine the age of the injuries due to decomposition of the soft tissue injuries.

In the meantime 1st Accused and other suspects were also arrested. 1st Accused, 2nd Accused, 3rd Accused and the other suspects were all charged with this offence. At the close of the prosecution's case the other Accused persons who were Accused 4, Accused 5 and Accused 6 were acquitted under section 306(1) of the Criminal Procedure Code as no prima facie case was established against them.

When put to their defence 1st Accused gave an unsworn defence in which he explained that he spent 26th October 2003 at his place of work at Kanyenyaini market where he operates a hotel. He was at the Hotel upto 4.00 p.m. when he left to go home with his wife. They arrived home at 6.45 p.m. He did not leave his home until the next morning at 6.00 a.m. when he went back to work. He testified that 2nd Accused who was his son normally stayed at the shamba of 1st Accused in Kiriri near Kamakwa market whenever he (i.e. 2nd Accused) was around.

1st Accused testified that on 8th November 2003 he was woken up from his sleep by the Assistant Chief. He was taken to the shops at Kamakwa, put in a vehicle and taken to Kangema police station where he found 2nd Accused, 3rd and 4th in the cells. It was from these Accused persons that he learnt of the recovery of a body from the house of 2nd Accused. He denied having gone to the house of 2nd Accused on the night of 26th October 2003.

2nd Accused in a sworn defence stated that in October 2003 he was working in Juja at the workshop of one Charles Gichuki. On 26th October 2003 he was in Juja. He had a house in Kiriri which he had left David Kamau Matheri (P.W.3) to take care of as his wife had left in July 2003 following a disagreement. 2nd Accused went back to Kiriri on 8th October 2003 after P.W.3 telephoned him and told him he was required urgently. On his way home He passed through a shop 2 kilometres away from his home. It was there that a brother of the deceased found him and with assistance of some people, and arrested him from the shop. He maintained that it was P.W.3 who framed him up as he had access to the house being the one taking care of the home. He denied having had the keys to the house.

3rd Accused also gave a sworn statement. He stated that he was a Form III student when he was sent home from school on 24th October 2003. He went to his father's farm at Kangari. On 26th October 2003 he remained home the whole day. On 8th November 2003 he left home to go to the centre to check on the

delivery of tea. He met the Assistant chief who asked him about his brother but he explained he had last seen him in April. The Assistant Chief then asked why he was not in school, 3rd Accused was unable to explain so the Assistant Chief thought he was being rude. The Assistant Chief slapped him, tied him up and took him to the police station. He claimed that he never used to visit his father's farm at Kiriri and did not know who was living in the farm.

Mr. Gacheru who appeared for 1st Accused urged the court to find that 1st Accused was never at the scene of murder as his alibi defence had not been displaced by the prosecution. He relied on the following authorities:-

§ Karanja v/s Republic (1982-1988) KAR 355.

§ Benjamini Bundeh Gardh & Peter Ooko Ndo v/s Republic (1982 – 1988) 1 KAR 587.

§ Raphael v/s Republic [1973] E A 473.

He further submitted that the case against 1st Accused was not proved as it relied on the uncorroborated evidence of a single witness in this regard He relied on Roria v/s Republic [1967] 583.

Mr. Nderi who appeared for 2nd Accused & 3rd urged the court to find that P.W. 3 was not a credible witness. He urged the court to reject the evidence of P.W. 3 on his identification of the Accused persons. He urged the court to find that no common intention had been established as provided under Section 21 of the Penal Code.

Following the directions and summing up, Assessors returned a unanimous opinion of guilty to murder against all the three Accused persons.

It is evident that there was no actual eye witness to the murder of the deceased.

The deceased's body was however positively identified by his brother P.W. 1 and P.W.7 Dr. Njeru (P.W.2) who performed the post mortem examination on the body of the deceased noted several injuries and formed the opinion that the deceased died from head injuries caused by a massive blunt force on the head and that there was also simultaneous suffocation.

I have therefore no doubt that the deceased died, as a result of head injuries and suffocation. The issue is who caused the deceased the injuries and suffocation? Was it a deliberate action intended to cause his death? It is apparent from the prosecution evidence that the case against the Accused persons is based on circumstantial evidence.

This court has therefore the responsibility of identifying the inculpatory facts (if any) that has been established and determine whether those established facts are "incompatible with the innocence of the Accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt".
[Republic v/s Kipkering arap Koske and Another (1949) 16 EACA 123]

The fact that the deceased was last seen on 26th October 2003 at 8.30 pm was testified to by P.W. 8 whose evidence I believe and accept. The fact that the body of the deceased was discovered buried in the house of 2nd Accused on 8th November 2003 was clearly testified to by P.W. 1, P.W.5, P.W. 6 and P.W. 9. These witnesses were all consistent in their evidence which evidence was further corroborated by the evidence of P.W. 4 who visited the scene and took photographs. I find therefore that it was established that the body of the deceased was recovered buried inside the house of 2nd Accused.

There was also the evidence of P.W. 3 who claimed to have seen 2nd Accused and 3rd Accused on the night of 26th October 2003 carrying a heavy load sagging over their shoulders, going into the house of 2nd Accused, whilst 1st Accused was illuminating the way for them using a torch. It is apparent that the circumstances in which P.W. 3 alleges He met the 3 men was not favourable for identification as it was a dark, wet night. I concur with the submissions of Mr. Gacheru who appeared for 1st Accused, that P.W. 3

being the only identifying witness in circumstances which were not favourable for a positive identification there is need to test his evidence so as to eliminate any possibility of a mistaken identification.

As concerns 2nd Accused, P.W.3 testified that He identified him by voice when 2nd Accused said “Hi” to P.W. 3, and P.W. 3 recognised his voice. P.W.3 also saw 2nd Accused and his companion walking towards 2nd Accused’s house. The evidence of P.W.3 in this regard is consistent with that of P.W. 5 to whom P.W.3 reported this encounter and the evidence of P.W. 5, P.W.6 and P.W. 9 who recovered the keys to the house from 2nd Accused and upon opening 2nd Accused’s house discovered the deceased’s body buried inside the house. The evidence of identification of 2nd Accused by P.W.3 does not therefore stand alone but is supported by other corroborative evidence.

I find that there was an inconsistency regarding P.W.3’s evidence that 2nd Accused admitted to him that they had killed the deceased and buried him in the house. I find it strange that P.W.5 to whom P.W.3 claims to have reported this admission maintained that P.W.3 only told him about his encounter with the Accused persons on 26th October 2003 and did not mention the alleged admission. P.W.5 only became suspicious when He learnt from P.W.3 of the alleged nocturnal activities, and linked the Accused persons with the deceased because He was aware that the deceased and 1st Accused had a case at Murang’a Court. It is unlikely that P.W.5 would have forgotten or denied such a crucial fact such as 1st Accused having admitted killing the deceased coming at the time when the whole village was engaged in the exercise of searching for the deceased. I am fully convinced that P.W.5 spoke the truth that P.W.3 never told him about the alleged admission by 2nd Accused. I am satisfied that the reason why 2nd Accused did not inform P.W.5 about the alleged admission, is because there was no such admission and P.W.3 therefore lied to the court that 2nd Accused had confessed to him. It is rather strange that P.W.3 should have lied. One gets the impression that there was more than meets the eye.

I have considered the defence of 2nd Accused that P.W.3 was the one who had framed him up, as P.W. 3 was the one taking care of his house and the one who had the keys to his house and also the same person who had telephoned 2nd Accused in Juja to urgently come home. Notwithstanding the lie told by P.W.3, I find that the defence of 2nd Accused cannot hold as it is clear from the evidence of P.W.5, P.W.6 and P.W. 9 that 2nd Accused is the one who had the keys to his house. I find that all the facts which have been proved point irresistibly to 2nd Accused having participated in the killing of the deceased and the concealment of the deceased’s body in his house.

Although there is no clear evidence of malice aforethought for the murder of the deceased, the circumstances are such that the death of the deceased can only be presumed to have been a deliberate and intentional act and the result of a common intention on the part of 2nd Accused and other persons. Accordingly I do concur with the opinion of the Assessors as regards 2nd Accused and find him guilty.

As concerns 3rd Accused P.W.3 does not appear to have specifically identified him at the time He alleges He met the 3 men. P.W.3 testified that it was dark and that one could not see clearly without using a torch. P.W.3 further admitted that when He met the two men carrying the luggage He did not torch the two people but looked at the luggage they were carrying and that is when 2nd Accused said “Hi” and He recognized his voice. It is clear that the attention of P.W.3 was on the luggage, and He therefore only managed to recognise 2nd Accused because of his voice. 3rd Accused did not however speak. In fact P.W.3 admitted when cross examined that He only identified 2nd Accused, and that it is 2nd Accused who later told him who his companion was P.W.3 having lied about his conversation with 2nd Accused, it is possible that the fact that 2nd Accused identified his companion to P.W.3 was also a lie and a figment of his own imagination. I find that the alleged identification of 3rd Accused was not reliable at all. It is evident that 3rd Accused was simply connected with 2nd Accused because of the fact that they are brothers. It was therefore presumed that they were together.

I find that the evidence adduced against 3rd Accused is completely inadequate to prove the charge against him. The evidence implicating 3rd Accused was only his identification by P.W.3. P.W.3 maintained that He flashed his torch on 3rd Accused when they were going to meet and that He saw and recognised him. P.W. 3 having lied to the court about a conversation He had with 2nd Accused, it is

apparent that the evidence of this witness must be treated extremely cautiously. I have looked for any other evidence that can provide corroboration to the evidence of P.W. 3 but I find none.

The mere fact that the body of the deceased was recovered from the house of 2nd Accused who is a son of 1st Accused is not sufficient to implicate 1st Accused. It was not disputed that 1st Accused had his own home separate from that of 2nd Accused. 1st Accused could therefore only have been implicated with what was happening at the house of 2nd Accused if there was clear evidence of his complicity. Unfortunately no such evidence was adduced.

Moreover, 1st Accused put forward the defence of an alibi stating that He was at his place of work and then at his home and did not at all go to the house of 2nd Accused. The prosecution did not however adduce any evidence to challenge the alibi put forward by 1st Accused. They only relied on the evidence of P.W.3 which evidence was not reliable, first because the circumstances were not favourable to a proper identification given that it was a dark rainy night and P.W.3 only had a fleeting flash at the person as He passed him and He did not even greet. The possibility of a genuine mistaken identification cannot be ruled out.

Secondly P.W.3 has shown that He has a propensity for exaggerating or telling a lie and it is possible that P.W.3 may have deliberately lied.

In a case such as this one which is dependant purely on circumstantial evidence the court must be satisfied that all the inculpatory facts have been established. In this case, the crucial fact linking 1st Accused with the offence i.e. his having been seen on the night of 26th October 2003 going to the house of 2nd Accused has not been proved. With due respect I disagree with the opinion of the Assessors in respect of 1st Accused and 3rd Accused and find each not guilty of the offence.

The upshot of the above is that 1st Accused and 3rd Accused are hereby acquitted of the charge and shall be released unless otherwise lawfully held. 2nd Accused is found guilty of murder and is convicted of the same.

Dated, delivered and signed this 14th day of February 2004.

H. M. OKWENGU

JUDGE